Supreme Court, U. S.
FILED
FEB 22 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

v.

MT. HOOD STAGES, INC., doing business as Pacific Trailways,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed October 25, 1977
Certiorari Granted January 9, 1978

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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RELEVANT DOCKET ENTRIES

In the United States District Court for the District of Oregon

Date	Document	Record Reference
July 5, 1968	Complaint	1-12
January 23, 1970	First Amended Complaint for Treble Damages and Injunctive Relief Under the Antitrust Laws and Unfair Competition Laws	306-315
April 22, 1970	Second Amended Complaint for Treble Damages Under the Antitrust Laws and for Damages Under the Unfair Competition Laws	439-448
June 8, 1970	Answer of Defendant Greyhound Lines, Inc., to Second Amended Complaint	451-456
July 27, 1971	Third Amended Complaint for Treble Damages Under the Antitrust Laws and for Damages Under the Unfair Competition Laws	691-700
August 23, 1971	Answer of Defendant Greyhound Lines, Inc., to Third Amended Complaint	702-706
June 7, 1972	Plaintiff's Supplemental Complaint	1015-1016
June 29, 1972	Answer of Defendant The Greyhound Corporation to Third Amended Complaint	1140-1144
July 6, 1972	Answer of Defendant Greyhound Lines, Inc., to Supplemental Complaint	1147-1148
July 6, 1972	Answer of Defendant The Greyhound Corporation to Supplemental Complaint	1151-1152
November 22, 1972	Letter dated November 22, 1972, from Judge Alfred T. Goodwin to counsel	1354-1357
May 2, 1973	Record of Jury Trial	2247
May 2, 1973	Special Verdict	2248-2249

Date	Document	Record Reference
May 9, 1973	Motion for Judgment Notwithstanding the Verdict, for a New Trial and to Strike Certain Evidence	2256-2258
May 11, 1973	Judgment	2261
May 15,1973	Renewal of Defendants' Motions	2262
May 18, 1973 (Received)	Petition of United States of America for Leave to Intervene (dated December 14, 1964)	2266-2273
May 18, 1973 (Received)	Order (dated June 4, 1965) (sic)	2275-2279
November 30, 1973	Memorandum and Order	2874-2881
December 4, 1973	Memorandum of Points and Authorities in Support of Plaintiff's Petition for Allowance of Attorneys' Fees	2882-2891
December 21, 1973	Memorandum and Order on Attorneys Fees	3271-3272
December 21, 1973	Amended Judgment	3273
December 26, 1973	Notice of Appeal by Greyhound Corporation and Greyhound Lines, Inc.	3275

In the United States Court of Appeals for the Ninth Circuit

Date	Document	Record Reference
February 19, 1974	Docketed Cause and entered Appearances of Counsel	
March 19, 1974	Filed 25 Appellants' Briefs	
May 30, 1974	Filed 25 Appellee's Briefs	
July 11, 1974	Filed 25 Appellants' Reply Briefs	
January 6, 1975	Cause Argued and Submitted	
June 9, 1977	Filed Opinion—Affirmed	
June 9, 1977	Filed and Entered Judgment	
June 23, 1977	Filed Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc	
August 4, 1977	Filed, as of August 3, Order: The Petition for Rehearing is denied and the suggestion for a rehearing in banc is rejected	
October 31, 1977	Received from Supreme Court Notice of Filing Petition for Certiorari on October 25, 1977, and assigned No. 77-598	

In the Supreme Court of the United States

January 9, 1978	Filed Order granting certiorari limited to Question 3 presented by the petition	

Before the Interstate Commerce Commission

In Re:

The Greyhound Corporation - Acquisitions:

Union Pacific Stages	MCF 5190	58 MCC 809
O.C. & N. Stages, Inc.	MCF 3102	50 MCC 123
Yahne, Inc. dba Inland Stages	MCF 3208	
Oregon Motor Stages	MCF 5403	50 MCC 657
Washington Motor Coach	MCF 3295	45 MCC 821
North Coast Lines	MCF 3687	55 MCC 801
B.C. Motor Transportation	MCF 5534	60 MCC 643
Pacific Greyhound Lines	MCF 5733	70 MCC 59

PETITION OF MT. HOOD STAGES, INC., FOR AN ORDER REOPENING OF THE ABOVE CAPTIONED CASES AND ATTACHING CERTAIN TERMS, CONDITIONS AND LIMITATIONS TO THE EXERCISE OF THE PRIVILEGES THEREIN GRANTED.

ALTERNATIVE PETITION FOR DIVESTITURE.

Comes now Mt. Hood Stages, Inc., an Oregon corporation, doing business under the assumed name Pacific Trailways (hereinafter referred to as Mt. Hood) to respectfully petition the Commission for an order reopening all of the above captioned cases for further hearing to consider the necessity of attaching certain terms, conditions and limitations to the privileges therein granted, as hereinafter set forth and requested, or, in the alternative, to order The Greyhound Corporation to divest itself of operations acquired in said proceedings.

In support of its petition, Mt. Hood represents and avers as follows: [1410]

I.

Mt. Hood is now and for more than 30 years has been a common carrier of passengers by motor bus, in interstate and intrastate commerce over regular routes. Its I.C.C. authority is held under docket number M.C. 70947. Page 1 of the 8-page exhibit attached hereto, and by this reference made a part hereof, shows Mt. Hood's regular routes. All of said routes pertinent to this petition are improved highways with relatively easy grades and curves over which the maximum legal speed for busses can be comfortably maintained.

II.

The vendor companies named in the series of cases set forth in the caption of this petition, supra, and which are now a part of the Greyhound Corporation system, operated over principal routes as shown in Exhibit 1, as follows:

Page 2, Pacific Greyhound Lines
Page 3, O.C. & N. Stages and Inland Stages
Page 4, Washington Motor Coach
Page 5, North Coast Transportation Co.
Page 6, Union Pacific Stages
Page 7, Oregon Motor Stages

Page 8 of Exhibit 1 shows the present encirclement of Mt. Hood by the Greyhound Corporation, resulting from the acquisitions listed in the caption hereof. The solid black lines are principal Greyhound routes, including, north of the U.S.-Canadian boundary, routes of Greyhounds's wholly owned Western Canadian Greyhound Lines. The dotted lines on page 8 show the routes of Mt. Hood. [1411]

III.

Mt. Hood's routes between Albany and Eugene, Oregon, on the one hand, and, on the other, points east of the Oregon-Idaho line, are shorter by 113 miles than the present all Greyhound routes via Portland. This mileage savings can

be realized by passengers originating at or destined to Western Oregon points on Greyhound routes such as Corvallis, Newport, Roseburg, Grants Pass, Coos Bay, etc. A joint-line service via Greyhound connecting with Mt. Hood at Eugene and Albany in western Oregon and at Ontario in eastern Oregon would be up to 4 hours faster than the present all Greyhound route through Portland. Because of the shorter mileage, Mt. Hood's fares are as much as $3.00 cheaper than the all Greyhound fares via Portland between said points in western Oregon, on the one hand, and, on the other, points served by both Greyhound and Mt. Hood east of the Oregon-Idaho boundary.

IV.

The mileage via a joint-line Greyhound-Mt. Hood route between Klamath Falls, Oregon and points south thereof, on the one hand, and, on the other, The Dalles and Biggs, Oregon and points on Greyhound routes north and east thereof, is approximately 116 miles shorter than via the all-Greyhound route through Portland.

Mt. Hood's routes via Bend and Burns, Oregon between Klamath Falls, on the one hand, and, on the other, Ogden, Utah and points north thereof on Greyhound's routes are approximately [1412] 23 miles less than the all-Greyhound route via Reno, Nevada and Salt Lake City, Utah.

Mt. Hood's route between Klamath Falls and Portland and points north thereof via Bend, Oregon is 19 miles longer than the Greyhound route via Eugene. Mt. Hood's route along the east side of the Cascade range of mountains, coming within ten miles of the perpetually snowcapped peak of Mt. Hood is very scenic in both summer and winter. Running time over Mt. Hood's route is approximately the same as Greyhound schedules via Eugene.

V.

The routes served by Mt. Hood east and west across Oregon and north and south between Klamath Falls and The Dalles are not served by any other surface common carrier of passengers. Greyhound and Mt. Hood have long followed the practice of honoring each other's tickets, participating in joint through rates and maintaining convenient connecting schedules. Greyhound has, in the past, showed Mt. Hood's service in its schedule folders, showed its routes upon maps furnished to its agents, and allowed Mt. Hood representatives to call upon Greyhound agencies to solicit the routing of passengers over its routes.

Two through schedules were established between San Francisco and Spokane, using Mt. Hood's Klamath Falls-The Dalles route as a "bridge" between Pacific Greyhound and [1413] Northwest Greyhound, which saved approximately 116 miles and as much as 5 hours compared with the all-Greyhound service via Portland. One of the two schedules was operated with a through bus under lease to Mt. Hood and driven by Mt. Hood drivers between Klamath Falls and The Dalles.

VI.

In its applications to the I.C.C. for authority to acquire and/or merge the said predecessor companies, Greyhound represented that the transactions would have no adverse effect upon other carriers. In the application to acquire U.P. Stages dba Overland Greyhound, for example, it was represented that the proposed transaction would "have no material adverse effect upon other carriers as Overland's routes will remain open to all other carriers" and that "The proposed transaction will foster and not impair carrier competition". (p. 59 of application, Exh. D)

A hearing was held at Washington, D.C. upon said application. Mt. Hood's manager appeared with counsel in opposition and expressed the fear that, after consummation, the Greyhound Corporation would engage in practices detrimental to Mt. Hood and the bus riding public. Witnesses for the applicants represented as follows:

> "It would have no effect on competition because it would not change our relations with any of our connections (R.J.O'Connor, General Traffic Manager, Overland System, tr 40). Counsel for the applicants said "You can take that as a commitment, because it [1414] is the same statement that the executive of the Greyhound Corporation will make". (Mr. Turney, tr 43)
>
> "One of the officers of the Greyhound Corporation who had discussed it with the president of Pacific Greyhound stated that he would authorize a witness for the corporation to state that, insofar as they were concerned, they had no idea of changing the present arrangements which they have with Pacific Trailways".

He also said that similar assurance applied with respect to the then present arrangements between Mt. Hood and Northwest Greyhound (formerly Washington Motor Coach). (L.H.Ristow, Director of Traffic, The Greyhound Corp. tr. 84)

Mr. Bogan, Executive Vice President and board member of the Greyhound Corporation and all of its subsidiaries, said that he had approved the arrangement for through busses operating between San Francisco and Spokane over Mt. Hood's route between Klamath Falls and The Dalles, Oregon, and that "It will be maintained". (tr. 95)

In reliance upon these representations, Mt. Hood withdrew as a protestant in that case. (tr. 143)

Mt. Hood protested Greyhound-Control-O.C. & N. Stages (MCF 3102) and Greyhound-Control-Yahne, Inc. dba Inland Stages (MCF 3208). O.C. & N. operated south of Klamath Falls to Reno and Yahne, between Reno and Los Angeles. Mt. Hood's contention was that these acquisitions would eliminate its only possible non-competitive connection for California traffic. [1415]

The examiners' report in the O.C. & N. case found that the proposed acquisition would result in "the elimination of the only independent motorbus company by Pacific Greyhound in a territory where they now have a virtual monopoly • • •" "Considering the acquisition by Pacific Greyhound of O.C. & N. alone, or in conjunction with the operation of Inland Stages, in which Pacific Greyhound already has a 3/7th interest, the examiners cannot find the transaction to be consistent with the public interest."

The Greyhound Corporation and its then subsidiary Pacific Greyhound succeeded in reversing the examiners. In their exceptions they said:

> "The Examiner has failed to review the contravening testimony of Mr. Fraley, reported upon pages 243 and 244 of the transcript. According to that testimony, the promise of Pacific Greyhound was that 'there would not be discrimination in the sale of transportation into the eastern Washington territory over the combined routes of Pacific Greyhound Lines to Klamath Falls and thence to The Dalles via the Pacific Trailways, there connecting with other carriers into the Northwest. In other words, a passenger is to have his choice of routes.' This testimony was not thereafter controverted."

The two cases were decided in a single report (50 MCC 123). The Division was apparently convinced that Mt. Hood's fears were groundless and granted those applications.

Without going into details petitioner states generally that the applications to acquire the other companies listed herein contained similar representations that they would have no adverse effect upon competition. [1416]

VII.

Since accomplishing the encirclement of Mt. Hood by means of said acquisitions and mergers, Greyhound is employing practices which are the opposite of the representations made to the Commission to secure approval, as follows:

(a) Ceased showing Mt. Hood schedules in Greyhound folders while continuing to show the service of numerous other non-Greyhound lines.
(b) Discontinued the through bus operated in connection with Mt. Hood between San Francisco and Spokane.
(c) Changed its schedules between San Francisco and Klamath Falls and between Biggs, Oregon and Spokane so as to break connections with Mt. Hood and force a delay of approximately 3 hours for any passenger seeking to use the shorter route via Mt. Hood.
(d) Cause its agents to fail or refuse to quote Mt. Hood's service and fares to inquiring prospective passengers, even when the Mt. Hood route is substantially shorter, the joint Greyhound-Mt. Hood service is substantially faster, and the fares lower than an all-Greyhound route.
(e) Caused its agents to quote Mt. Hood service in an unfavorable light, or in an inaccurate manner, to inquiring prospective passengers who specifically request information on Mt. Hood service.
(f) Discontinued showing Mt. Hood's connecting routes upon its maps while continuing to show the connecting routes of numerous other non-Greyhound carriers.
(g) Requested Mt. Hood to discontinue calling upon Greyhound agencies.
(h) Refused to establish joint through rates. [1417]
(i) At Greyhound depots also occupied by Mt. Hood it discriminates against Mt. Hood by refusing to announce over its speaker systems or to show upon its schedule boards Mt. Hood's departures for points which can be reached via an all-Greyhound route, or to impartially inform prospective passengers inquiring, over the phone or over the counter, of Mt. Hood's service and fares to such points.
(j) At commission agencies which sell both Greyhound and Mt. Hood tickets where, because of its vastly greater coverage and correspondingly greater sales possibilities for the agent, Greyhound is in a position to dictate and exert pressure, it influences such agents to favor Greyhound in the quoting of service, display of advertising, and in other respects.

VIII.

By means of the acquisitions herein listed, and others, The Greyhound Corporation has attained a position of unparalleled dominance in the intercity scheduled motor bus business in the Pacific Region as shown by the following figures from the Commissions Bureau of Transport Eco-

nomics and Statistics on Class 1 Motor Carriers of Passengers, 1963:

	Revenues	Per Cent of Pacific Region Total
Greyhound	$113,266,659	96.1
Mt. Hood	1,294,904	1.1
Las Vegas-Tonopah-Reno	813,539	.69
Continental-Pacific	768,051	.65
Orange Belt Stages	554,871	.47
Peerless Stages	490,128	.41
Sun Valley Bus Lines	337,265	.28
Citizen Auto Stage Co.	223,749	.19
Santa Fe Tpn.	126,622	.11
Total Pacific Region	$117,875,788	100.00

[1418]

IX.

The certificates reissued to Greyhound in the hereinbefore listed acquisitions are all "subject, however, to such terms, conditions and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier."

Part I Section 5(9) of the Act gives the Commission specific authority to make such supplemental orders "as it may deem necessary or appropriate" in acquisition cases.

Your petitioner respectfully requests that all of the said proceedings be reopened and assigned for further hearing to receive evidence supporting the allegations herein contained and which, your petitioner believes, will justify the insertion in the said acquired certificates of terms, conditions and limitations which will have the effect of prohibiting the discriminatory and destructive competitive practices hereinbefore described, requiring restoration of useable joint-line schedules between points south of Klamath Falls, on the one hand, and, on the other, points north

and east of The Dalles and Biggs, Oregon, and otherwise specifically enforcing the promises, representations and assurances relied upon by the Commission in approving the said acquisitions.

Your petitioner prays in the alternative that Greyhound be required to divest itself of self paralleling opera- [1419] tions operations [sic] acquired by means of said false representations, for example:

(a) One of the two routes acquired between The Dalles and Spokane, Washington.
(b) The Klamath Falls-Los Angeles route acquired from O.C. & N. and Inland Stages which gave it a third route between California points and points in Washington and Oregon.
(c) The route acquired from B.C. Motors exactly paralleling the route acquired from North Coast Lines.

Expedited handling of this matter is requested.

Dated at Portland, Oregon
October 7, 1964.

MT. HOOD STAGES, INC.
dba Pacific Trailways
By: WILLIAM A. NISKANEN
William A. Niskanen
Vice President and Manager
1048 Bond Street
Bend, Oregon
/s/ DONALD A. SCHAFER
Donald A. Schafer
Attorney at Law
12321 S.E. Evergreen Highway
Vancouver, Washington [1420]

VERIFICATION

STATE OF OREGON }
County of Multnomah } ss.

WM. A. NISKANEN, being duly sworn, deposes and says: that he is Vice President and General Manager of the petitioner in the above entitled proceedings; that he has read the foregoing petition and knows the contents thereof; that the same is true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

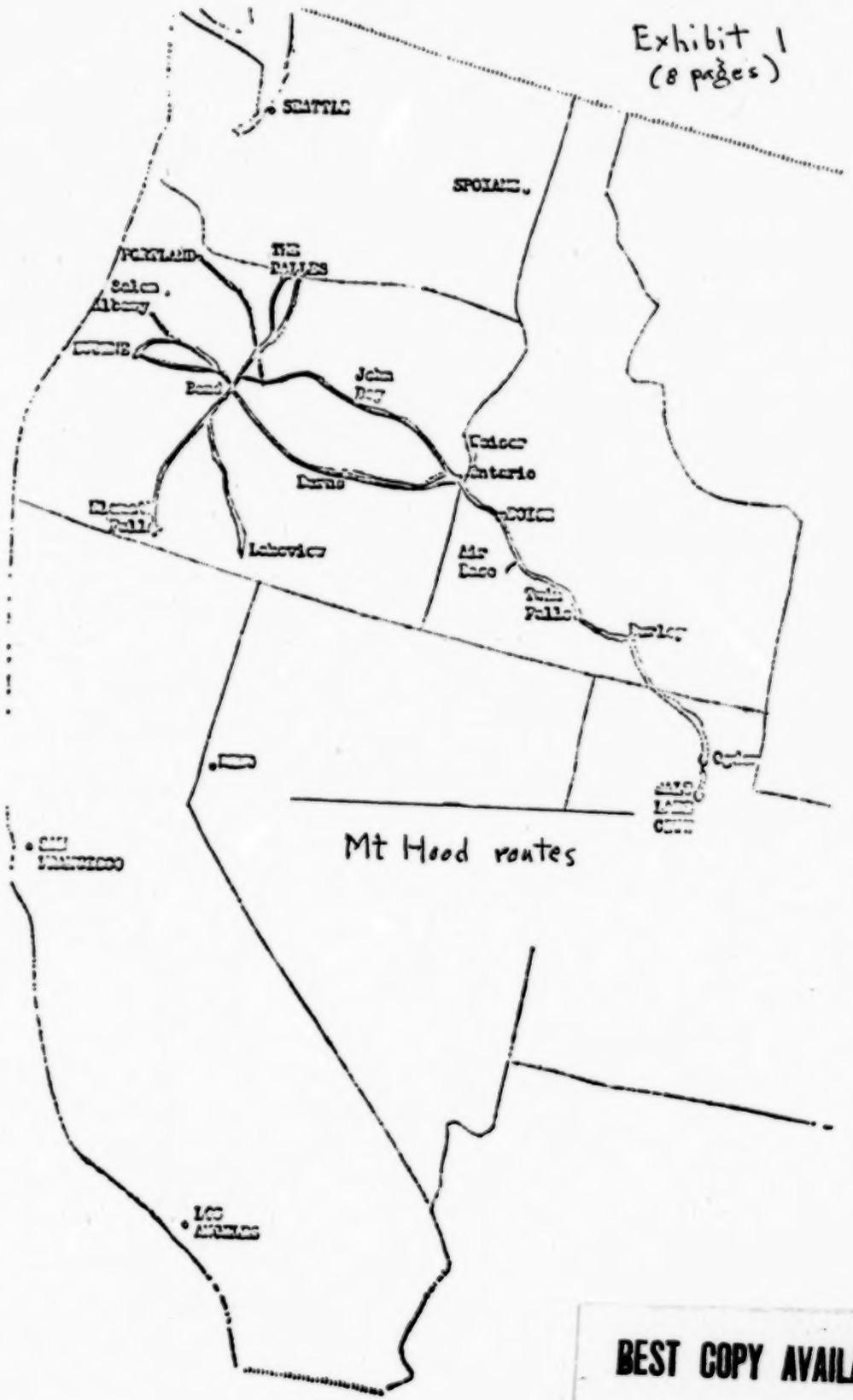
/s/ WM. A. NISKANEN

Subscribed in my presence, and sworn to before me, by the affiant above named, this 7th day of October, 1964.

/s/ GRACE G. MURRAY
Notary Public for Oregon
Commission expires 8/5/68 [1421]

[Certificate of service omitted in printing]

[EXHIBITS FOLLOW]



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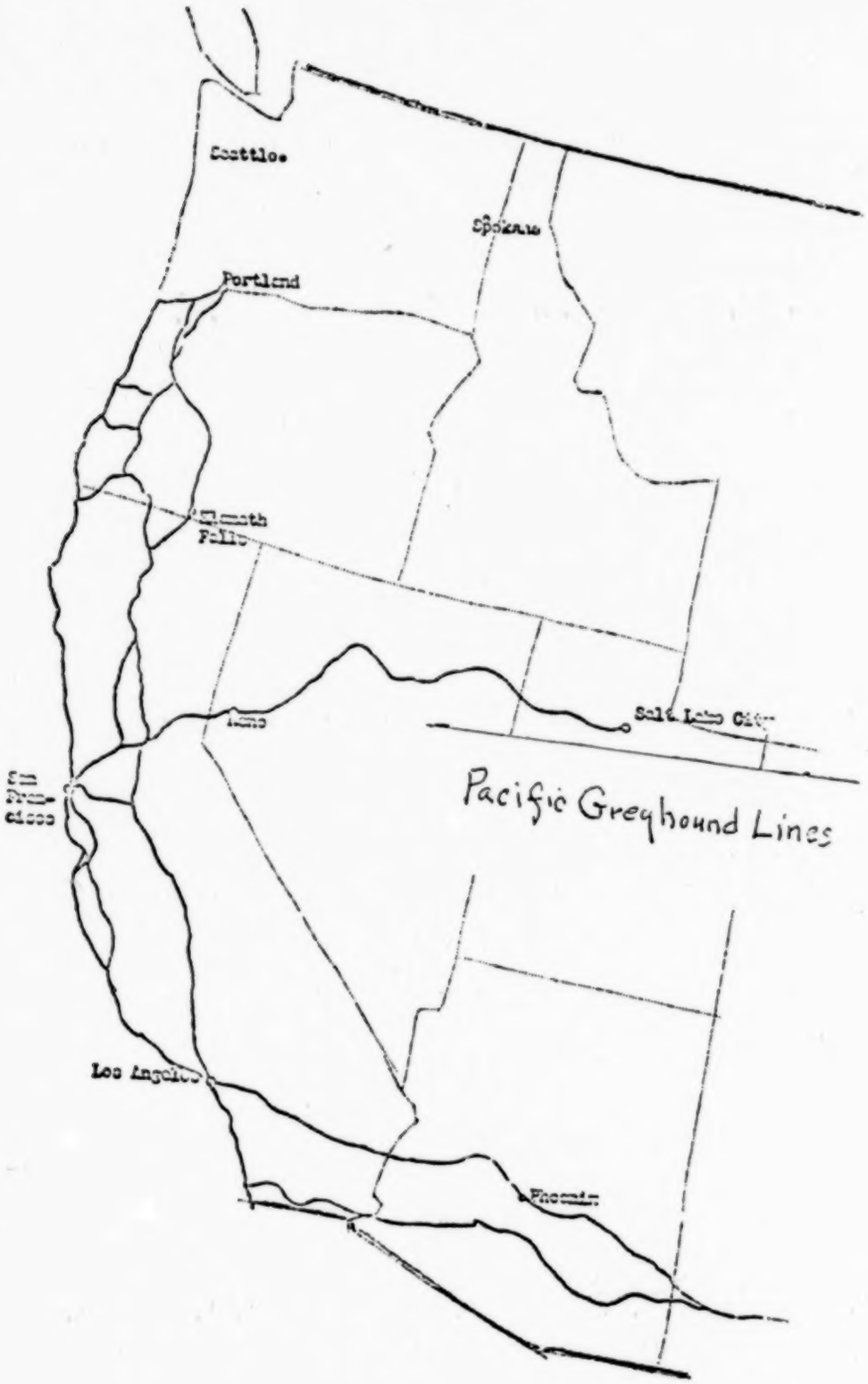
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Klamath Falls
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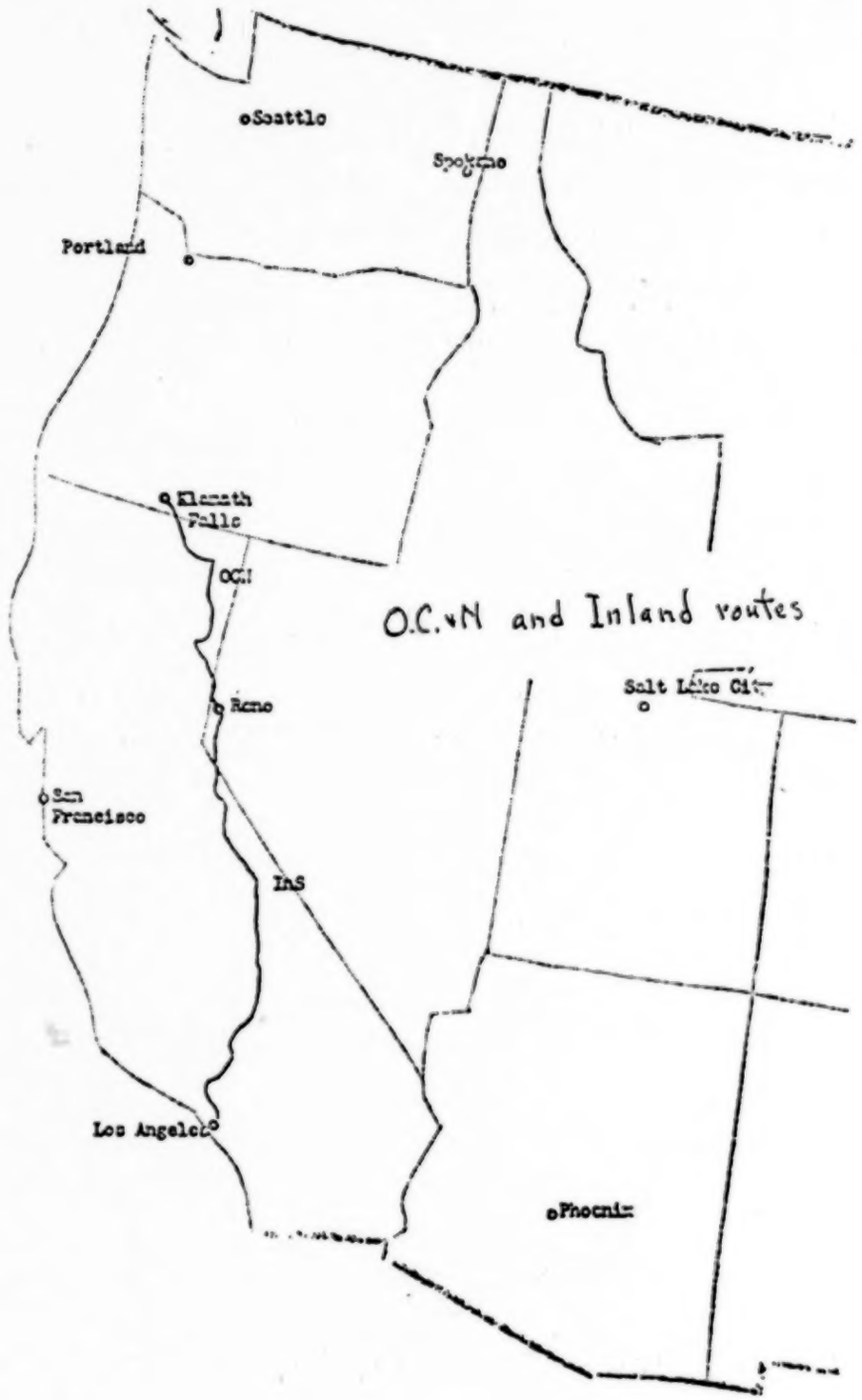
San Francisco
Los Angeles
Phoenix
Pacific Greyhound Lines

2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O.C.
Reno
Salt Lake City
San Francisco
Los Angeles
Phoenix
O.C.vN and Inland routes

3

Washington Motor Coach

4

North Coast Transportation Co.

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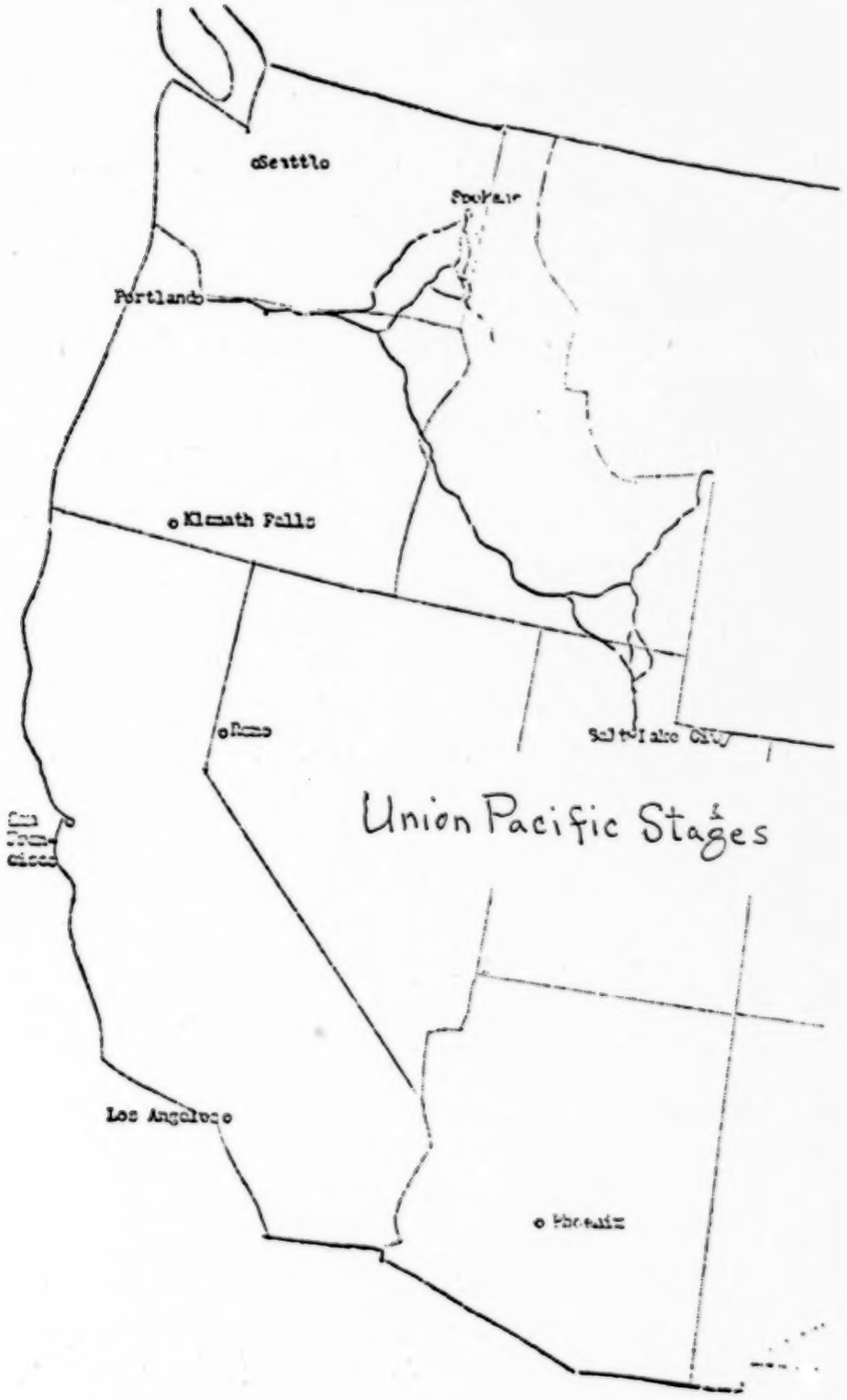
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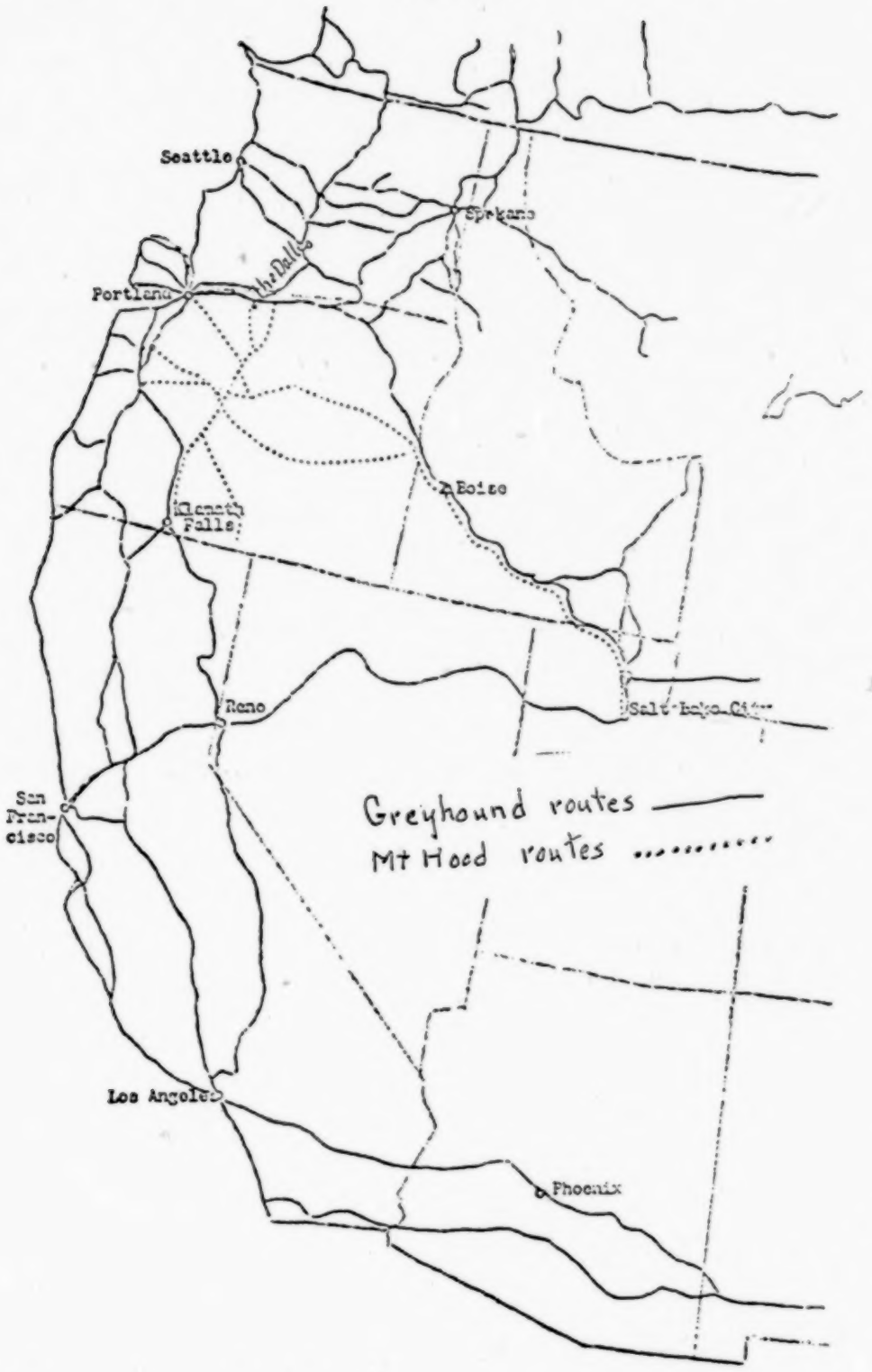

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Before the Interstate Commerce Commission

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E.C. Motor Transportation	MCF 5534	60 MCC 643
Pacific Greyhound Lines	MCF 5733	70 MCC 59

AMENDMENT TO PETITION

Comes now Mt. Hood Stages, Inc., dba Pacific Trailways to amend its petition (filed October 7, 1964) to reopen the above captioned cases for further hearing, as follows:

Substitute the attached amended pages 1, 9, 10, 11, and 12 for the present pages 1, 9, 10, 11 and 12, and add the attached pages 13 and 14.

Dated at Portland, Oregon

December 1, 1964

/s/ DONALD A. SCHAFER
Donald A. Schafer
Attorney for Mt. Hood Stages, Inc.
12321 S.E. Evergreen Highway
Vancouver, Washington 98664 [1402]

PETITION OF MT. HOOD STAGES, INC.,
FOR AN ORDER REOPENING OF THE ABOVE
CAPTIONED CASES AND ATTACHING CERTAIN
TERMS, CONDITIONS AND LIMITATIONS TO
THE EXERCISE OF THE PRIVILEGES
THEREIN GRANTED.

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II.

The vendor companies named in the series of cases set forth in the caption of this petition, supra, and which are now a part of the Greyhound Corporation system, operated over principal routes as shown in Exhibit 1, as follows:

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Page 8 of Exhibit 1 shows the present encirclement of Mt. Hood by the Greyhound Corporation, resulting from the acquisitions listed in the caption hereof. The solid black lines are principal Greyhound routes, including, north of the U.S.-Canadian boundary, routes of Greyhound's wholly owned Western Canadian Greyhound Lines. The dotted lines on page 8 show the routes of Mt. Hood. [963]

III.

Mt. Hood's routes between Albany and Eugene, Oregon, on the one hand, and, on the other, points east of the Oregon-Idaho line, are shorter by 113 miles than the present all Greyhound routes via Portland. This mileage savings can be realized by passengers originating at or destined to Western Oregon points on Greyhound routes such as Corvallis, Newport, Roseburg, Grants Pass, Coos Bay, etc. A joint-line service via Greyhound connecting with Mt. Hood at Eugene and Albany in western Oregon and at Ontario in eastern Oregon would be up to 4 hours faster than the present all Greyhound route through Portland. Because of the shorter mileage, Mt. Hood's fares are as much as $3.00 cheaper than the all Greyhound fares via Portland between said points in western Oregon, on the one hand, and, on the other, points served by both Greyhound and Mt. Hood east of the Oregon-Idaho boundary.

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The mileage via a joint-line Greyhound-Mt. Hood route between Klamath Falls, Oregon and points south thereof, on the one hand, and, on the other, The Dalles and Biggs, Oregon and points on Greyhound routes north and east thereof, is approximately 116 miles shorter than via the all-Greyhound route through Portland.

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VI.

In its applications to the I.C.C. for authority to acquire and/or merge the said predecessor companies, Greyhound represented that the transactions would have no adverse effect upon other carriers. In the application to acquire U.P. Stages dba Overland Greyhound, for example, it was represented that the proposed transaction would "have no material adverse effect upon other carriers as Overland's routes will remain open to all other carriers" and that "The proposed transaction will foster and not impair carrier competition". (p. 59 of application, Exh. D)

A hearing was held at Washington, D.C. upon said application. Mt. Hood's manager appeared with counsel in opposition and expressed the fear that, after consummation, the Greyhound Corporation would engage in practices detrimental to Mt. Hood and the bus riding public. Witnesses for the applicants represented as follows:

> "It would have no effect on competition because it would not change our relations with any of our connections (R.J.O'Connor, General Traffic Manager, Overland System, tr 40). Counsel for the applicants said "You can take that as a commitment, because it [966] is the same statement that the executive of the Greyhound Corporation will make". (Mr. Turney, tr 43)
>
> "One of the officers of the Greyhound Corporation who had discussed it with the president of Pacific Greyhound stated that he would authorize a witness for the corporation to state that, insofar as they were concerned, they had no idea of changing the present arrangements which they have with Pacific Trailways".

He also said that similar assurance applied with respect to the then present arrangements between Mt. Hood and Northwest Greyhound (formerly Washington Motor Coach). (L.H.Ristow, Director of Traffic, The Greyhound Corp. tr. 84).

Mr. Bogan, Executive Vice President and board member of the Greyhound Corporation and all of its subsidiaries, said that he had approved the arrangement for through busses operating between San Francisco and Spokane over Mt. Hood's route between Klamath Falls and The Dalles, Oregon, and that "It will be maintained". (tr. 95)

In reliance upon these representations, Mt. Hood withdrew as a protestant in that case. (tr. 143)

Mt. Hood protested Greyhound-Control-O.C. & N. Stages (MCF 3102) and Greyhound-Control-Yahne, Inc. dba Inland Stages (MCF 3208). O.C. & N. operated south of Klamath Falls to Reno and Yahne, between Reno and Los Angeles. Mt. Hood's contention was that these acquisitions would eliminate its only possible non-competitive connection for California traffic. [967]

The examiners' report in the O.C. & N. case found that the proposed acquisition would result in "the elimination of the only independent motorbus company by Pacific Greyhound in a territory where they now have a virtual monopoly * * *" "Considering the acquisition by Pacific Greyhound of O.C. & N. alone, or in conjunction with the operation of Inland Stages, in which Pacific Greyhound already has a 3/7th interest, the examiners cannot find the transaction to be consistent with the public interest."

The Greyhound Corporation and its then subsidiary Pacific Greyhound succeeded in reversing the examiners. In their exceptions they said:

> "The Examiner has failed to review the contravening testimony of Mr. Fraley, reported upon pages 243 and 244 of the transcript. According to that testimony, the promise of Pacific Greyhound was that 'there would not be discrimination in the sale of transportation into the eastern Washington territory over the combined routes of Pacific Greyhound Lines to Klamath Falls and thence to The Dalles via the Pacific Trailways, there connecting with other carriers into the Northwest. In other words, a passenger is to have his choice of routes.' This testimony was not thereafter controverted."

The two cases were decided in a single report (50 MCC 123). The Division was apparently convinced that Mt. Hood's fears were groundless and granted those applications.

Without going into details petitioner states generally that the applications to acquire the other companies listed herein contained similar representations that they would have no adverse effect upon competition. [968]

VII.

Since accomplishing the encirclement of Mt. Hood by means of said acquisitions and mergers, Greyhound is employing practices which are the opposite of the representations made to the Commission to secure approval, as follows:

(a) Ceased showing Mt. Hood schedules in Greyhound folders while continuing to show the service of numerous other non-Greyhound lines.

(b) Discontinued the through bus operated in connection with Mt. Hood between San Francisco and Spokane.

(c) Changed its schedules between San Francisco and Klamath Falls and between Biggs, Oregon and Spokane so as to break connections with Mt. Hood

and force a delay of approximately 3 hours for any passenger seeking to use the shorter route via Mt. Hood.

(d) Caused its agents to fail or refuse to quote Mt. Hood's service and fares to inquiring prospective passengers, even when the Mt. Hood route is substantially shorter; the joint Greyhound-Mt. Hood service is substantially faster, and the fares lower than an all-Greyhound route.

(e) Caused its agents to quote Mt. Hood service in an unfavorable light, or in an inaccurate manner, to inquiring prospective passengers who specifically request information on Mt. Hood service.

(f) Discontinued showing Mt. Hood's connecting routes upon its maps while continuing to show the connecting routes of numerous other non-Greyhound carriers.

(g) Requested Mt. Hood to discontinue calling upon Greyhound agencies.

(h) Refused to establish joint through rates. [969]

(i) At Greyhound depots also occupied by Mt. Hood it discriminates against Mt. Hood by refusing to announce over its speaker systems or to show upon its schedule boards Mt. Hood's departures for points which can be reached via an all-Greyhound route, or to impartially inform prospective passengers inquiring, over the phone or over the counter, of Mt. Hood's service and fares to such points.

(j) At commission agencies which sell both Greyhound and Mt. Hood tickets where, because of its vastly greater coverage and correspondingly greater sales possibilities for the agent, Greyhound is in a position to dictate and exert pressure, it influences such agents to favor Greyhound in the quoting of service, display of advertising, and in other respects.

VIII.

Your petitioner believes that the practices alleged in sub paragraphs (a) to (j), paragraph VII, supra, represent in the aggregate a purpose on the part of Greyhound to either drive Mt. Hood out of business or to weaken it to a point where it will be forced to sell at a sacrifice figure far below what would have been reasonable based upon past earnings. Contributing reasons for the said Greyhound practices are ascribed as follows:

(1) Greyhound's then president, Mr. Frailey, in 1961 discussed with Mt. Hood's management the matter of Greyhound purchasing Mt. Hood's north-south route between Klamath Falls and The Dalles and Biggs, Oregon. The proposal was rejected by Mt. Hood's management for the reason that such a sale would give Greyhound a route from Portland into Central Oregon in competition for Mt. Hood's passenger, express and charter business in an area so sparsely populated that it could not support such compe- [970] tition. The certain result would be the collapse of the balance of Mt. Hood's system. A further probable result of such a sale would be the loss to Continental Pacific Trailways (formerly West Coast Bus Lines) of a substantial volume of business, interlined at Portland, which loss would seriously jeopardize that company's already marginal operations and, if that line were also to be abandoned, there would be no Trailways service in the entire Pacific Northwest, north of San Francisco and west of Salt Lake City.

(2) On November 29, 1962 Greyhound applied to the Public Utilities Commissioner of Oregon for authority to abandon service over certain routes in Oregon and concurrently, by prearrangement with Greyhound, a Mr. Houck, dba Valley Stages, applied for the routes which Greyhound wanted to

abandon. On December 14, 1962 Mt. Hood also applied for that same authority, both to the Interstate Commerce Commission and to the Oregon Commissioner. Greyhound thereupon dismissed its application to abandon and protested both of Mt. Hood's applications. Mr. Houck, at the same time, dismissed his application. Mt. Hood's applications, as amended, were for authority to extend 11 miles west from Albany, Oregon to Corvallis and north from Eugene, Oregon to Corvallis.

Greyhound's then president, Mr. Frailey, by telephone calls and a letter to officers of Mt. Hood, thereafter urged that Mt. Hood should dismiss its applications. The president of Western Greyhound Division, Mr. Thomas of San Francisco, also made the same request. These requests, as worded, contained the veiled threat that, unless the applications were dismissed, relations between Mt. Hood and Greyhound would be adversely affected with serious consequences for Mt. Hood. Mt. Hood did not dismiss either application and has been granted a certificate of public convenience and necessity for the interstate service. (M.C. 70947, Sub 18). The Public Utilities Commissioner of Oregon denied the intrastate application for a permit and Mt. Hood presently has pending in the Circuit Court of Benton County, Oregon a suit to set aside the Commissioner's order. [971]

(3) Mt. Hood has, in other ways, refused to submit to dictation by Greyhound and thereby incurred the displeasure of Greyhound; for example, by voting against joint line fare increases proposed by Greyhound in numerous cases and by refusing Greyhound's request for an increase from 10% to 15% commission to Greyhound on interline sales by Greyhound.

IX.

Mt. Hood's revenues from traffic interlined with Greyhound are down 70% in October, 1964, as compared with October, 1963. Mt. Hood, as a result, has been compelled to reduce service over its routes causing inconvenience to the communities affected and causing a diversion of prospective passengers to private transportation, both interstate and intrastate. The loss of both interline and local traffic is seriously impairing Mt. Hood's ability to continue rendering a first-class convenient service over its routes. Most of the communities affected have no other common carrier passenger service of any kind.

X.

By means of the acquisitions herein listed, and others, The Greyhound Corporation has attained a position of unparalled dominance in the intercity scheduled motor bus business in the Pacific Region as shown by the following figures from the Commissions Bureau of Transport Economics and Statistics on Class 1 Motor Carriers of Passengers, 1963: [972]

	Revenues	Per Cent of Pacific Region Total
Greyhound	$113,266,659	96.1
Mt. Hood	1,294,904	1.1
Las Vegas-Tonopah-Reno	813,539	.69
Continental-Pacific	768,051	.65
Orange Belt Stages	554,871	.47
Peerless Stages	490.128	.41
Sun Valley Bus Lines	337,265	.28
Citizen Auto Stage Co.	223,749	.19
Santa Fe Tpn.	126,622	.11
Total Pacific Region,	$117,875,788	100.00

Greyhound's monopoly over most of the main routes in the Pacific Northwest gives it a traffic originating advantage which, if unrestrained, and unfairly used, will enable it to starve out Mt. Hood.

XI.

The certificates reissued to Greyhound in the hereinbefore listed acquisitions are all "subject, however, to such terms, conditions and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier", and Part I Section 5(9) of the Act gives the Commission specific authority to make such supplemental *orders* "as it may deem necessary or appropriate" in acquisition cases.

Your petitioner respectfully requests that all of the said proceedings be reopened and assigned for further hearing to receive evidence supporting the allegations herein contained and which, your petitioner believes, will justify the issuance of a general supplemental order which will have the effect of prohibiting the discriminatory and destructive competitive [973] practices hereinbefore described; requiring restoration of usable joint-line schedules between points south of Klamath Falls, on the one hand, and, on the other, points north and east of The Dalles and Biggs, Oregon; and otherwise specifically enforcing the promises, representations and assurances relied upon by the Commission in approving the said acquisitions.

Dated at Portland, Oregon
December 1, 1964.

MT. HOOD STAGES, INC.
dba Pacific Trailways
/s/ By: WILLIAM A. NISKANEN
William A. Niskanen
Vice President and Manager
1048 Bond Street
Bend, Oregon
/s/ DONALD A. SCHAFER
Donald A. Schafer
Attorney at Law
12321 S.E. Evergreen Highway
Vancouver, Washington [974]

[Verification, Certificate of Service and Exhibits omitted in printing] [975]

Before The

Interstate Commerce Commission

In the Matter of:

THE GREYHOUND CORPORATION - CONTROL AND MERGER - INTERSTATE TRANSIT LINES, ET AL	Docket No. MC-F-5190
THE GREYHOUND CORPORATION - CONTROL; PACIFIC GREYHOUND LINES - CONTROL AND MERGER - O. C. AND N. STAGES, INC.	Docket No. MC-F-3102
THE GREYHOUND CORPORATION - CONTROL; PACIFIC GREYHOUND LINES - CONTROL AND MERGER - M. C. YAHNE, INC., d/b/a INLAND STAGES	Docket No. MC-F-3208
THE GREYHOUND CORPORATION - CONTROL; PACIFIC GREYHOUND LINES - CONTROL - OREGON MOTOR STAGES	Docket No. MC-F-5403
THE GREYHOUND CORPORATION - CONTROL WASHINGTON MOTOR COACH COMPANY, INC.	Docket No. MC-F-3295
THE GREYHOUND CORPORATION - CONTROL - NORTH COAST TRANSPORTATION COMPANY	Docket No. MC-F-3687
THE GREYHOUND CORPORATION - PURCHASE - B. C. MOTOR TRANSPORTATION, LTD.	Docket No. MC-F-5534
THE GREYHOUND CORPORATION - MERGER - PACIFIC GREYHOUND LINES; CONTROL - CALIFORNIA PARLOR CAR TOURS COMPANY	Docket No. MC-F-5733

PETITION OF UNITED STATES OF AMERICA FOR LEAVE TO INTERVENE

The United States of America by the undersigned, respectfully represents that it has an interest in the proceedings captioned [2266] above and petitions the Commission for leave to intervene in said proceedings and to participate therein as a party thereto. The United States believes it to be of importance that the Commission set the petition of

Mt. Hood Stages, Inc. and reply of the Greyhound Corporation for hearing and that the Commission proceed to decision thereon as expeditiously as possible. As ground for this petition the United States states as follows:

1. The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8-9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business; and that such acts and practices are contrary to assurances given by Greyhound in the acquisition proceedings that such acquisitions would not adversely affect the public or other carriers, and specifically Mt. Hood, because there would be no [2267] change in Greyhound's relations with competing carriers.[1]

Greyhound's reply (pp. 21-24) in turn, freely admits certain of Mt. Hood's allegations but categorically denies others. We have no way of knowing whether those of Mt. Hood's allegations which Greyhound denies are true or false; resolution of such controversies is a typical function

1. In an amendment to its petition Mt. Hood states that for October, 1964, the first full month after Greyhound's termination of the San Francisco-Spokane through bus service, its revenues from traffic interlined with Greyhound are down 70 percent by comparison with October 1963. Depending of course on the relative importance of interline revenue to total revenue such a drop could make the difference between overall profit or loss. But the amendment also states that as a result of this drop Mr. Hood has also had to curtail local service as well, even though most of the communities affected have no other common carrier services.

of a hearing. We do know that when Greyhound asked the Commission to approve the acquisitions, responsible Greyhound officials repeatedly gave the Commission the assurances Mt. Hood details (petition, pp. 5-7); those assurances are not consistent with the various acts Mt. Hood now alleges. Mt. Hood's grave allegations, whether true or false, as well as Greyhound's answer raise issues too serious and important to be disposed of summarily without a full adversary hearing in which allegation and denial can be put to the test of proof and cross-examination. Certainly Greyhound [2268] deserves the opportunity to demonstrate, by evidence more compelling than mere denial, either that Mt. Hood's allegations are false or that the acts and practices Mt. Hood has alleged are not motivated by a desire to destroy a small competitor and cannot have that effect.

2. Greyhound's reply characterizes Mt. Hood's petition as complaining principally if not exclusively of Greyhound having discontinued the through bus service Greyhound maintained for many years from San Francisco to Spokane with Mt. Hood as the intermediate or bridge carrier from Klamath Falls to The Dalles. (Reply, pp. 5, 11-12, 16, 18-19, 21-22). We do not read Mt. Hood's petition as so limited. Mt. Hood appears to be complaining of a developing pattern of hostile and harmful acts on the part of Greyhound over the recent past, including among numerous others Greyhound's termination of this service.

3. We believe Mt. Hood's petition raises no problems in the nature of laches. We have no doubt, for example, that if Greyhound immediately after the Commission authorized any particular acquisition had discontinued the San Francisco-Spokane through bus in the face of explicit assurance it would not do so, or had taken other steps of the kind Mt. Hood now alleges, the Commission would have promptly

canceled or modified its approvals. If anything, the need for sharp surveillance of any abuse of the power these [2269] acquisitions have given Greyhound and for prompt action to correct any such abuse has become more important as Greyhound's encirclement of Mt. Hood has become more complete with each successive acquisition; Mt. Hood, with each successive loss of an independent connection to Greyhound, has necessarily become increasingly vulnerable to attack by Greyhound and increasingly dependent upon Greyhound for survival.[2]

4. Mt. Hood's petition, and particularly Greyhound's reply, raise issues of primary jurisdiction in the Commission to grant or withhold at least some of the relief Mt. Hood seeks, which a decision by the Commission would assist in defining and clarifying. Greyhound's reply (p. 17), for example, quotes a passage from *Carolina Coach Co.-Control and Merger,* 59 M.C.C. 681 (at p. 693), for the proposition that the Commission has no power to order restoration of the San Francisco-Spokane through bus service. We think the Commission did not meet or decide that issue there and that the issue is still open; indeed the Commission, immediately after the passage Greyhound's reply quotes, intimated that but for the offer of Carolina, the survivor of the merger, to continue [2270] a through bus service comparable to that provided by the merged company, it would have ordered continuation of the through bus. In the present situation the Commission could make a determination of the scope of its jurisdiction over through bus services, either under its broad powers under section 216 or its visitorial powers under section 5(9), that would be mean-

2. Certainly the 1947 antitrust decree in *United States v. Pacific Greyhound Lines et al,* (C.A. 25267-5; D.C.N.D. Cal.), which is as old as the oldest of the acquisitions in question here, is open to amendment despite its age.

ingful and not academic; if the evidence supports Mt. Hood's other allegations of predatory conduct on the part of Greyhound it could conceivably save an independent carrier from extinction at the hands of an infinitely more powerful rival. Similarly Mt. Hood's companion complaints, that Greyhound refuses to establish joint rates and has revised other schedules so that passengers who desire to use the shorter and quicker Greyhound-Mt. Hood interchange service must wait for three hours for arrival of the connecting Greyhound or Mt. Hood bus, certainly should be heard and determined. As Mt. Hood's petition alleges, in effect, that these acts by Greyhound are part of a pattern of conduct constituting as a whole the reason why the acquisition proceedings should be reopened, we think it would only hamper the process of decision to remit each Mt. Hood allegation to a separate proceeding under some particular section [2271] of the Interstate Commerce Act to which the allegation could be related.[3]

5. Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Grey-

3. It would appear from current issues of Russell's Official Bus Guide that passengers for Spokane on the Mt. Hood bus which leaves Klamath Falls at 4:00 P.M., 10 minutes after Greyhound's arrival at 3:50 P.M., must wait at The Dalles from arrival at 10:50 P.M. until departure of the Greyhound bus for Spokane at 1:49 A.M. Similarly San Francisco-bound passengers on the Mt. Hood bus which leaves Biggs at 3:00 P.M., 10 minutes after Greyhound's arrival at 2:50 P.M., must wait at Klamath Falls, where it arrives at 9:10 P.M. until Greyhound's departure at 11:50 P.M. On other runs the wait is reversed. Greyhound, southbound, arrives at The Dalles at 4:15 A.M. Mt. Hood departs at 7:00 A.M. and arrives at Klamath Falls at 1:55 P.M. to connect with Greyhound's departure at 2:10 P.M. Greyhound, northbound, arrives at Klamath Falls at 5:45 A.M. Mt. Hood departs at 8:15 A.M. and arrives at Biggs at 2:50 P.M. to connect with Greyhound's departure at 3:05 P.M. Mt. Hood cannot make up the delay in any of these instances, it can only shift the delay to the other end of its run.

hound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not. If Mt. Hood can establish its allegations, it is desirable that it have the [2272] opportunity to do so and also that the Commission determine its course as promptly as possible. For if it then appears that the Commission lacks jurisdiction to dispose of Mt. Hood's complaint, in whole or in part, Mt. Hood, remitted to another forum, may find relief elsewhere illusory if it comes too late to be effective.

Respectfully submitted,
/s/ WILLIAM H. ORRICK, JR.
William H. Orrick, Jr.
Assistant Attorney General

/s/ JOSEPH J. SAUNDERS
Joseph J. Saunders
Attorney, Department of Justice

/s/ JOHN H. DOUGHERTY
John H. Dougherty
Attorney, Department of Justice

December 14, 1964 [2273]

[Certificate of Service omitted in printing] [2274]

SERVICE DATE
JUNE 4, 1965

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 27th day of May, A. D. 1965.

No. MC-F-9136

MT. HOOD STAGES, INC., PETITION FOR MODIFICATION—GREYHOUND MERGERS (WESTERN DIVISION)

There being under consideration the following pleadings in the above-entitled matter:

1. Petition of Mt. Hood Stages, Inc., doing business as Pacific Trailways, of Bend, Oregon, dated October 7, 1964, as amended December 1, 1964, for an order reopening certain proceedings under section 5 of the Interstate Commerce Act, involving The Greyhound Corporation and other companies which are now a part of Greyhound Lines, Inc.;
2. Petition of National Trailways Bus System, dated October 29, 1964, for leave to intervene in support of petitioner;
3. Replies of The Greyhound Corporation, dated November 6, 1964, and December 18, 1964, to the above-described petitions and amendment;
4. Petition by the United States Department of Justice, dated December 14, 1964, for leave to intervene;
5. Reply of The Greyhound Corporation, dated December 23, 1964, to the above-described petition;
6. Petition of the Public Utility Commissioner of Oregon, dated January 20, 1965, for leave to intervene in support of petitioner to reopen proceedings, and

motion of the said Commissioner to strike a certain portion of the reply to the amended petition;

7. Petition of the Idaho Public Utilities Commission, dated February 26, 1965, for leave to oppose or support said petition of Mt. Hood Stages, Inc.;

and good cause therefor appearing:[2275]

It is ordered, That the above-entitled matter be, and it is hereby, assigned for hearing at a time and place to be hereafter fixed, for the purpose of determining whether any supplemental order or orders should be issued under section 5(9) of the Interstate Commerce Act in any of the proceedings named in the attached appendix imposing or modifying conditions therein or an order issued under any other appropriate section of the Act in this proceeding with respect to whatever acts or facts involving violation of the Act, if any, may be proven at the said hearing.

It is further ordered, That the United States Department of Justice, Public Utility Commissioner of Oregon, Idaho Public Utilities Commission, and National Trailways Bus System, be, and they are hereby, permitted to intervene and be treated as parties to this proceeding, with the right to have notice of and to appear at the taking of testimony, produce and cross-examine witnesses and be heard on brief and oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow intervenors to introduce evidence which will unduly broaden the issues raised in this proceeding.

It is further ordered, That the following portion of the reply, dated December 18, 1964, to the amended petition be, and it is hereby, stricken:

Page 6—Lines 5 through 9 inclusive

It is further ordered, That a copy of this order be served upon each of the parties named herein, and that a copy be filed in each of the dockets listed in the appendix hereto.

By the Commission, Division 3.

/s/ BERTHA F. ARMES
BERTHA F. ARMES,
Acting Secretary.

(SEAL) [2276]

APPENDIX

Docket Nos.		Report
MC-F-3102	The Greyhound Corp.—Control; Pacific Greyhound Lines—Control and Merger—O.C. & N. Stages, Inc.	50 M.C.C. 123
MC-F-3203	The Greyhound Corp.—Control; Pacific Greyhound Lines—Control and Merger—M. C. Yahne, Inc., doing business as Inland Stages	50 M.C.C. 123
MC-F-3295	The Greyhound Corp.—Control—Washington Motor Coach Co., Inc.	45 M.C.C. 821
MC-F-3687	The Greyhound Corp.—Control—North Coast Transportation Co.	55 M.C.C. 801
MC-F-4024	The Greyhound Corp.—Control; Pacific Greyhound Lines—Control—Oregon Motor Stages	55 M.C.C. 321
MC-F-4360	The Greyhound Corp.—Merger—Northwest Greyhound Lines, Inc., and North Coast Greyhound Lines, Inc.	56 M.C.C. 238
MC-F-5190	The Greyhound Corp.—Control and Merger—Interstate Transit Lines et al	58 M.C.C. 809
MC-F-5403	The Greyhound Corp.—Control; Pacific Greyhound Lines—Purchase (Portion)—Oregon Motor Stages	59 M.C.C. 657
MC-F-5534	The Greyhound Corp.—Purchase—B. C. Motor Transportation, Ltd.	60 M.C.C. 643
MC-F-5733	The Greyhound Corp.—Merger—Pacific Greyhound Lines; Control—California Parlor Car Tours Co.	70 M.C.C. 59
MC-F-8531	California Parlor Car Tours Co.—Pur.—The Greyhound Corp. [2277]	93 M.C.C. 392

June 4, 1965

[Certificate of Service omitted in printing] [2278] & [2279]

In the United States District Court
for the District of Oregon

Civil No. 68-374

MT. HOOD STAGES, INC. dba PACIFIC TRAILWAYS,
Plaintiff,

v.

THE GREYHOUND CORPORATION and GREYHOUND LINES, INC.,
Defendants.

COMPLAINT FOR TREBLE DAMAGES AND INJUNCTIVE RELIEF UNDER THE ANTI-TRUST AND UNFAIR COMPETITION LAWS

(JURY DEMANDED)
FIRST CAUSE OF ACTION
JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against defendants pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §15 and § 26), being a part of the antitrust laws of the United States, for violations of such laws. The purpose of this action is to prevent and restrain continuing violations by the defendants, as hereinafter alleged, and to recover damages, as provided by law, for injuries to plaintiff's business and property within the period allowed by law for which injuries proximately resulted from defendants' violations. Defendants' violations are continuing and persist to the date of this complaint.

2. The unlawful acts and violations of law herein [1] described have been conceived, carried out, made effective and performed in major part within the above district and have affected areas in other states of the United States.

3. Plaintiff Mt. Hood Stages, Inc., doing business under the assumed name "Pacific Trailways", is a corporation

organized under the laws of Oregon, having its principal place of business in Bend, Oregon. It is primarily engaged in the operation of scheduled common carrier passenger motor bus service in both interstate and intrastate commerce in the states of Oregon, Idaho and Utah, and specifically within the District of Oregon.

4. Defendant The Greyhound Corporation (hereinafter referred to as "Greyhound Corp.") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the City of Chicago, Illinois. It is at present a holding company, owning, among other assets, all of the issued and outstanding capital stock of defendant Greyhound Lines, Inc. From 1959, the exact time not now being known to plaintiff, until 1964, the exact time not now being known to plaintiff, Greyhound Corp. was engaged in the operation of scheduled common carrier passenger motor bus service in interstate and intrastate commerce in all states in the United States except Alaska and Hawaii, and specifically within the District of Oregon. During the year 1964, the exact time not now being known to plaintiff, Greyhound Corp. transferred substantially all of its motor carrier operating rights and properties to its wholly-owned subsidiary, the defendant Greyhound Lines, Inc.

5. Defendant Greyhound Lines, Inc., is a corporation incorporated under the laws of the State of California, having its principal place of business in the City of Chicago, Illinois. Commencing in 1964, the exact time not now being known to plaintiff, and continuing until the present time, Greyhound Lines has been engaged in the operation of scheduled common carrier passenger [2] motor bus service in interstate and intrastate commerce in all states in the

United States except Alaska and Hawaii and specifically within the District of Oregon.

THE MARKET INVOLVED

6. The market with respect to which the violations of the antitrust laws alleged herein took place is the scheduled common carrier passenger motor bus service market within the Western United States. Plaintiff and defendants and their predecessors have conducted, among other activities, operations in that market. Tickets for the passenger service described have been made available to the public through selling agents and outlets, many of whom are located at bus terminals. Used in aid of such sales are printed materials such as schedules and maps showing available service to prospective travelers. Often, as has been the case here, joint-line service is made available to the public. Under such a system two or more passenger carriers interconnect their routes and establish and publish joint rates, fares and charges and mutually honor tickets of other carriers involved.

DESCRIPTION OF PLAINTIFF'S BUSINESS

7. Plaintiff has operated daily scheduled service from and between various points within Oregon, Idaho and Utah, over approximately 1500 miles, using approximately 46 buses.

DESCRIPTION OF DEFENDANTS' BUSINESS

8. Defendants constitute the largest company engaged in passenger motor carriage in the United States. They control approximately 96% of all revenues earned by all Class I passenger motor carriers in the Western United States. They have possessed monopoly power by reason

of control of main routes, depots and selling agents and outlets in the Western United States. They have thereby possessed the power to eliminate or restrain the trade of plaintiff or any other competitor and have done so by the means hereinafter pleaded. [3]

INTERSTATE COMMERCE

9. The violations herein alleged have occurred in interstate commerce or substantially and directly affect interstate commerce. Defendants are interstate instrumentalities who have unlawfully used their power over interstate commerce to restrain and destroy competition in Oregon, Idaho and Utah.

VIOLATION OF THE ANTITRUST LAWS

10. Plaintiff alleges that beginning before 1947 and continuously and uninterruptedly to and including the date of filing this complaint, defendants have combined, contracted and conspired as between themselves and among their respective officers and directors to restrain and monopolize trade and commerce in the scheduled common carriage of passengers and their luggage by motor coach to, from and between points in the Western United States including Oregon, Idaho and Utah and have jointly and severally attempted to monopolize, monopolized, substantially lessened competition and tended to create a monopoly therein, all in violation of 15 U.S.C. §§ 1 and 2 (Sherman Act §§ 1 and 2), 15 U.S.C. §§ 14 and 18 (Clayton Act §§ 3 and 7.)

11. In furtherance of such violations, defendants have, among other acts, done and performed the following:

(a) Have acquired control of several formerly independent bus lines and merged them into their own system.

(b) Have obtained consent of the Interstate Commerce Commission for such acquisitions or mergers based upon the following representations and assurances each of which were not carried out with respect to plaintiff but were ignored or disregarded when it suited defendants' anti-competitive purposes:

(1) That the acquisitions or mergers would have no adverse effect upon plaintiff.

(2) That the acquired or merging companies' routes would remain open to plaintiff and other [4] carriers.

(3) That plaintiff's connections with such acquired or merging companies would remain the same after the completion of the transaction.

(4) That joint-line operations in existence at the time of such acquisitions or mergers would remain unchanged thereafter.

(5) That defendants' policy was not to route passengers circuitously but to sell the most direct route, even that of a competing line, and that defendants would not discriminate against plaintiff in the sale of transportation.

(6) That joint-line operations as well as nondiscriminatory selling of plaintiff's routes was profitable to defendants and there was no reason for plaintiff to fear diversion of traffic.

(7) That joint-routes and plaintiff's own routes would continue to show in defendants' schedule folders and maps after the mergers.

(8) That defendants would in no way discriminate against plaintiff.

(c) Have induced plaintiff to discontinue its protests to such acquisitions and mergers upon assurance by defendants that such representations would be adhered to.

(d) Are possessed of and have acquired facilities for selling bus service by reason of their over-all economic power and such acquisitions and mergers. As a result defendants have effective control of such selling agencies

and outlets in the west and throughout the United States. By use and manipulation of such selling agencies and outlets defendants have:

(1) Failed to publicize the joint-line service with plaintiff in effect prior to [5] September 1964, or to show such service on defendants' schedules.

(2) Publicized their own service routes and rates while in some instances failing to quote plaintiff's more advantageous connecting service routes and rates and in other instances quoting inaccurate and unfavorable information concerning plaintiff's connecting service, routes and rates.

(3) Failed to show plaintiff's routes on route maps.

(4) Discriminated against plaintiff in defendants' depots and stations by giving inaccurate information concerning plaintiff's service routes and rates while quoting accurately such information with respect to their own service and the service of other bus lines.

(5) Instructed defendants' selling agents to sell tickets to passengers over circuitous and more costly routes rather than to use the joint-line route or plaintiff's other routes.

(e) Have dismissed a request to abandon service when upon filing an application for such abandonment, plaintiff applied for the rights being abandoned. Thereupon, defendants protested plaintiff's application and threatened plaintiff with retaliation unless its application was dropped.

(f) Have discontinued existing joint-line through bus operations with plaintiff and have refused to enter into any such further arrangements.

(g) Have deliberately created long delays in making connections between buses of defendants and plaintiff in order to induce passengers to refrain from using plaintiff's service.

(h) By reason of extensive sales opportunities inherent [6] in defendants' extensive operations and the power

arising from them, defendants have influenced and coerced commission agents to refrain from informing the public of plaintiff's service, to misquote plaintiff's service, to divert all passengers to Greyhound routes and to prevent plaintiff from advertising in jointly occupied depots.

(i) Have refused, in depots controlled by them, to announce the arrivals and departures of plaintiff's buses, to show schedules of plaintiff or to inform the public of plaintiff's service.

(j) Have controlled sales practices of other passenger bus lines requiring them to use Greyhound tickets and to favor Greyhound routings.

(k) Have required plaintiff to spend inordinately large sums of money in regulatory proceedings which were instituted or protested as a result of defendants' anticompetitive behavior.

EFFECT OF VIOLATIONS

12. As a direct result of the violations alleged, defendants have achieved a nearly complete monopoly in the scheduled common carrier motor bus service market in Oregon, Idaho and Utah. They have virtual and complete control of routes, selling agencies and outlets and depots. Such control has been used by defendants to encircle plaintiff's routes, thus giving them the means to siphon off customers who would otherwise use plaintiff's services because of shorter time, more scenic route and lower charges. However, the public has not been aware of plaintiff's superior service available to them either as a joint-line operation or as plaintiff's sole operation because of defendants' virtual and complete control over depots, selling agencies and outlets and the distribution of printed material disseminating information concerning routes. [7]

Plaintiff's ability to remain a viable business entity has been endangered, its revenues have been substantially reduced and its capital and other funds have been debilitated. Plaintiff alleges that its management, equipment and method of operation are efficient and competitive. However, the effect of defendants' overwhelming control of the market coupled with the exercise of power arising from such control to plaintiff's detriment has deprived plaintiff of the opportunity for the normal growth of its scheduled business which it would otherwise have experienced and would now be experiencing.

FRAUDULENT CONCEALMENT

13. Plaintiff suspected prior to July 1964 that it had a claim under the antitrust or other laws for defendants' failure to quote plaintiff's services accurately or at all, to announce arrivals and departures of plaintiff's buses, to include plaintiff's services on their schedules and maps, or for defendants' policy of diversion of traffic away from plaintiff's services and to defendants' circuitous and more expensive routes and of instructing agents accordingly. However, prior to July, 1964 defendants denied such actions to plaintiff and the ICC, which actions were in effect thereby concealed in the records and minds of defendants and their officers and directors. From 1947 forward and at various times continuously until July 1964, defendants' employees told plaintiff that they were quoting plaintiff's services and rates accurately whenever such service might best suit the needs of passengers, that they were announcing plaintiff's arrivals and departures, that plaintiff's services were listed on defendants' maps and schedules and that there was no policy to divert traffic from plaintiff to defendants by not quoting or making plaintiff's services

known to the public. These material representations and denials were made with intent that plaintiff and the ICC rely thereon, were known to defendants to be untrue when made, and plaintiff and the ICC did [8] justifiably rely thereon.

DAMAGES

14. As a direct and proximate result of the violations alleged, plaintiff has been damaged in that the present and future value of its business and property has been substantially injured, its past and future profits seriously impaired, and it has suffered an immense loss of good will and reputation, all to its damage in an amount presently not known to plaintiff, but which will be proved at trial.

INJUNCTIVE RELIEF

15. Plaintiff alleges that unless this Court denies defendants their position of power and the means to exercise the same, competition will no longer exist in the relevant market. The continuing conduct of defendants will cause irreparable injury, loss and damage to plaintiff unless enjoined and restrained by the Court.

SECOND CAUSE OF ACTION FOR UNFAIR COMPETITION

1. Plaintiff is a corporation incorporated under the laws under the State of Oregon having its principal place of business in the State of Oregon and defendant The Greyhound Corporation is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in a state other than the State of Oregon, and defendant Greyhound Lines, Inc. is a corporation incorporated under the laws of the State of California, having its principal place of business in a state other than the State

of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. Plaintiff realleges paragraphs 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15 of its First Cause of Action.[9]

3. Defendants acted wilfully and maliciously and without justification for the purpose of injuring plaintiff and destroying its business. In addition to general damages as proved, plaintiff is entitled to punitive damages as proved.

THIRD CAUSE OF ACTION FOR UNFAIR COMPETITION

1. This Court has jurisdiction under 28 U.S.C. 1331 (a), 1338 (a) (b), 15 U.S.C. 1121 and 15 U.S.C. 1126 (b) (h) and (i), this being a claim for unfair competition under the laws of the United States.

2. Plaintiff realleges the allegations of paragraphs 2 and 3 of its Second Cause of Action, and 9 of its First Cause of Action and states that the foregoing conduct has been to plaintiff's irreparable damage.

WHEREFORE, plaintiff prays:

A. That the conduct of defendants as alleged to be adjudged and decreed unlawful.

B. That judgment be entered against defendants, and each of them, for treble the amount of damages suffered by plaintiff as a result of violations of the antitrust laws alleged herein and for attorney's fees and costs as required by Section 4 of the Clayton Act.

C. For injunctive relief to the extent justified by the proof.

D. For damages as proved for unfair competition and for punitive damages under its Second Cause of Action.

E. For damages as proved for unfair competition under its Third Cause of Action and costs as required thereunder,

and for injunctive relief to the extent justified by the proof. [10]

F. For other relief as the Court shall deem proper.

RIVES & SCHWAB
HERBERT M. SCHWAB
BRUCE M. HALL
DONALD A. SCHAFER

BROAD, BUSTERUD & KHOURIE
MICHAEL N. KHOURIE
J. STANLEY POTTINGER
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff [11]

F. For other relief as the Court shall deem proper.

RIVES & SCHWAB
HERBERT M. SCHWAB
BRUCE M. HALL
DONALD A. SCHAFER

BROAD, BUSTERUD & KHOURIE
MICHAEL N. KHOURIE
J. STANLEY POTTINGER
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff

Plaintiff demands trial by jury of all issues so triable in the above captioned proceedings.

RIVES & SCHWAB
HERBERT M. SCHWAB
BRUCE M. HALL
DONALD A. SCHAFER
BROAD, BUSTERUD & KHOURIE
MICHAEL N. KHOURIE
J. STANLEY POTTINGER
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff [12]

United States District Court
District of Oregon

[Title omitted in printing]

Civil No. 68-374

THIRD AMENDED COMPLAINT FOR TREBLE DAMAGES UNDER THE ANTITRUST LAWS AND FOR DAMAGES UNDER THE UNFAIR COMPETITION LAWS

(JURY DEMANDED)

FIRST CAUSE OF ACTION

Jurisdiction and Venue

(1) This Third Amended Complaint is filed and these proceedings are instituted against Defendants pursuant to sections 4 and 16 of the Clayton Act (15 USC § 26), being a part of the antitrust laws of the United States for violation of such laws. The purpose of this action is to prevent and restrain continuing violations by the Defendants as hereinafter alleged, and to recover damages, as provided by law, for injuries to Plaintiff's business and property within the period allowed by law for which injuries proximately resulted from Defendants' violations. Defendants' violations are continuing and persist to the date of this Complaint.

(2) The unlawful acts and violations of law herein described have been conceived, carried out, made effective and performed [691] in major part within the above district and have affected areas in other states of the United States.

(3) Plaintiff Mt. Hood Stages, Inc., doing business under the assumed name "Pacific Trailways", is a corporation organized under the laws of Oregon, having its principal

place of business in Bend, Oregon. It is primarily engaged in the operation of scheduled common carrier passenger motor bus service in both interstate and intrastate commerce in the states of Oregon, Idaho and Utah, and specifically within the District of Oregon.

(4) Defendant The Greyhound Corporation (hereinafter referred to as "Greyhound Corp.") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the City of Chicago, Illinois. It is at present a holding company owning, among other assets, all of the issued and outstanding capital stock of Defendant Grayhound [sic] Lines, Inc. From 1959, the exact time not now being known to Plaintiff, Greyhound Corp. was engaged in the operation of scheduled common carrier passenger motor bus service in interstate and intrastate commerce in all states in the United States except Alaska and Hawaii, and specifically within the District of Oregon. During the year 1964, the exact time not now being known to Plaintiff, Greyhound Corp. transferred substantially all of its motor carrier operating rights and properties to its wholly-owned subsidiary, the Defendant Greyhound Lines, Inc.

(5) Defendant Greyhound Lines, Inc. is a corporation incorporated under the laws of the State of California, having its principal place of business in the City of Chicago, Illinois. Commencing in 1964, the exact time not now being known to Plaintiff, and continuing until the present time, Greyhound Lines, Inc. has been engaged in the operation of scheduled common carrier passenger motor bus service in interstate and intrastate commerce in all states in the United States except Alaska and Hawaii, and specifically within the District of Oregon. [692]

The Market Involved

(6) The market with respect to which the violations of the antitrust laws alleged herein took place is the scheduled common carrier passenger motor bus service market within the Western United States. Plaintiff and Defendants and their predecessors have conducted, among other activities, operations in that market. Tickets for the passenger services described have been made available to the public through selling agents and outlets, many of whom are located at bus terminals. Used in aid of such sales are printed materials such as schedules and maps showing available service to prospective travelers. Often, as has been the case here, joint-like [sic] service is made available to the public. Under such a system, two or more passenger carriers interconnect their routes and establish and publish joint rates, fares and charges and mutually honor tickets of other carriers involved.

Description of Plaintiff's Business

(7) Plaintiff has operated daily scheduled service from and between various points within Oregon, Idaho and Utah, over approximately 1,500 miles, using approximately 46 buses.

Description of Defendant's Business

(8) Defendants constitute the largest company engaged in passenger motor carriage in the United States. They control approximately 96% of all revenues earned by all Class I passenger motor carriers in the Western United States. They have possessed monopoly power by reason of control of main routes, depots and selling agents and outlets in the Western United States. They have thereby pos-

sessed the power to eliminate or restrain the trade of Plaintiff or any other competitor and have done so by means hereinafter pleaded.

Interstate Commerce

(9) The violations herein alleged have occurred in interstate commerce or substantially and directly affect interstate commerce. Defendants are interstate instrumentalities who have unlawfully used their power over interstate commerce to restrain and destroy [693] competition in Oregon, Idaho and Utah.

Violation of the Antitrust Laws

(10) Plaintiff alleges that beginning before 1947 and continuously and uninterruptedly to and including the date of filing this Complaint, Defendants have combined, contracted and conspired as between themselves, among their respective officers and directors, and at various times thereafter with certain officials of the Amalgamated Transit Union and with Defendants' numerous ticket selling agencies, to restrain and monopolize trade and commerce in the scheduled common carriage of passengers and their luggage by motor coach to, from and between points in the Western United States including Oregon, Idaho and Utah and have jointly and severally attempted to monopolize, monopolized substantially lessened competition and tended to create a monopoly there all in violation of 15 USC §§ 1 and 2 (Sherman Act §§ 1 and 2).

(11) In pursuit of said combination, contract and conspiracy and with the motive and intent of substantially lessening competition and achieving monopoly by means violative of said laws, defendants have, jointly and severally, beginning before 1947 to and including the date of

filing this Third Amended Complaint, among other acts, done and performed the following:

(a) Have acquired control of several formerly independent bus lines, selling agents, outlets and depots with which Plaintiff had enjoyed beneficial economic relationships and merged them into their own system so as to almost completely encircle Plaintiff's operations with operations dominated by Defendant.

(b) Have sought and obtained consent of the Interstate Commerce Commission for such encircling acquisitions or mergers based upon the following representations and assurances, each of which relied upon by Plaintiff and each of which were not carried out with respect to Plaintiff but were ignored or disregarded when it suited Defendants' anticompetitive purposes:

(1) That the acquisitions or mergers would have [694] no adverse effect upon Plaintiff.

(2) That the acquired or merged companies' routes would remain open to Plaintiff and other carriers.

(3) That Plaintiff's connections with such acquired or merging companies would remain the same after the completion of the transaction.

(4) That joint-line operations in existence at the time of such acquisitions or mergers would remain unchanged thereafter.

(5) That Defendants' policy was not to route passengers circuitously but to sell the most direct route, even that of a competing line, and that Defendants would not discriminate against Plaintiff in the sale of transportation.

(6) That joint-line operations as well as nondiscriminatory selling of Plaintiff's routes was profitable to Defendants and there was no reason for Plaintiff to fear diversion of traffic.

(7) That joint-routes and Plaintiff's own routes would continue to show in Defendants' schedule folders and maps after the mergers.

(8) That Defendants would in no way discriminate or cause selling agents and other outlets to discriminate against Plaintiff.

(e) Have induced Plaintiff to discontinue its protests to such acquisitions and mergers upon assurance by Defendants that such representations would be adhered to.

(d) Are possessed of and have acquired facilities for selling bus service by reason of their overall economic power and position of encirclement of Plaintiff resulting from such acquisitions and mergers. As a result Defendants have effective control of such [695] selling agencies and outlets in the west and throughout the United States. By use and manipulation of such selling agencies and outlets Defendants have:

(1) Failed to publicize the joint-line service with Plaintiff in effect prior to September, 1964, or to show such service on Defendants' schedules.

(2) Publicized their own service routes and rates while in some instances failing to quote Plaintiff's more advantageous connecting service routes and rates and in other instances quoting inaccurate and unfavorable information concerning Plaintiff's connecting service, routes and rates.

(3) Failed to show Plaintiff's routes on route maps.

(4) Discriminated against Plaintiff in Defendants' depots and stations by giving inaccurate information concerning Plaintiff's service routes and rates while quoting accurately such information with respect to their own service and the service of other bus lines.

(5) Instructed Defendants' selling agents to sell tickets to passengers over circuitous and more costly routes rather than to use the joint-line route or Plaintiff's other routes.

(e) Have dismissed a request to abandon service when upon filing an application for such abandonment, Plaintiff applied for the rights being abandoned. Thereupon, Defendants protested Plaintiff's application and threatened Plaintiff with retaliation unless its application was dropped.

(f) Have discontinued existing joint-line through bus operations with Plaintiff and have refused to enter into any such further arrangements. [696]

(g) Have deliberately created long delays in making connections between buses of Defendants and Plaintiff in order to induce passengers to refrain from using Plaintiff's service.

(h) By reason of extensive sales opportunities inherent in Defendants' extensive operations and the power arising from them, Defendants have influenced and coerced commission agents to refrain from informing the public of Plaintiff's service, to misquote Plaintiff's service, to divert all passengers to Greyhound routes and to prevent Plaintiff from advertising in jointly occupied depots.

(i) Have refused in depots controlled by them to announce the arrivals and departures of Plaintiff's buses, to show schedules of Plaintiff or to inform the public of Plaintiff's service.

(j) Have controlled sales practices of other passenger bus lines requiring them to use Greyhound tickets and to favor Greyhound routings.

(k) Have required Plaintiff to spend inordinately large sums of money in regulatory proceedings which were instituted or protested as a result of Defendants' anticompetitive behavior.

(l) Have collaborated with certain officials of the Amalgamated Transit Union to induce said union to make arbitrary and oppressive wage demands upon Plaintiff, thereby

causing a strike and work stoppage of Plaintiff's operations from May 15 to July 6, 1964.

Effect of Violations

(12) As a direct result of the violations alleged, Defendants have achieved a nearly complete monopoly in the scheduled common carrier motor bus service market in Oregon, Idaho and Utah. They have virtual and complete control of routes, selling agencies and outlets and depots. Such control has been used by Defendants.

Fraudulent Concealment

(13) Plaintiff suspected prior to July, 1964 that it had a claim under the antitrust or other laws for Defendants' failure to quote Plaintiff's services accurately or at all, to announce arrivals [697] and departures of Plaintiff's buses, to include Plaintiff's services on their schedules and maps, or for Defendants' policy of diversion of traffic away from Plaintiff's services and to Defendants' circuitous and more expensive routes and of instructing agents accordingly. However, Defendants have persistently denied such practices to Plaintiff and the ICC and have concealed from Plaintiff the fact that they had actively colluded and collaborated with their ticket selling agencies to engage in those practices and have concealed from Plaintiff their collusion with officials of the Amalgamated Transit Union as alleged herein, which collusive practices were in effect thereby concealed in the records and minds of Defendants and their officers and directors. At all times since the inception of the conspiracy alleged herein, Defendants' employees told Plaintiff that Defendants and their ticket agents were quoting Plaintiff's services and rates accurately whenever

such service might best suit the needs of passengers; that they were announcing Plaintiff's arrivals and departures; that Plaintiff's services were listed on Defendants' maps and schedules; that there was no policy to divert traffic from Plaintiff to Defendants by not quoting or making Plaintiff's services known to the public; and that instructions had been given by Defendants to their ticket agents to sell passenger tickets via the most direct route even though it was via the more direct route of another carrier. These material representations and denials were made with the intention that Plaintiff and the ICC rely thereon, were known to Defendants to be untrue when made, and Plaintiff and the ICC did justifiably rely thereon. Defendants thus deliberately and fradulently [sic] concealed from Plaintiff their collusive and conspiratorial activities as alleged herein.

Damages

(14) As a direct and proximate result of the violations alleged, Plaintiff has been damaged in that the present and future value of its business and property has been substantially injured, its past and future profits seriously impaired, and it has suffered an immense [698] loss of goodwill and reputation, all to its damage in an amount presently not known to Plaintiff, but which will be proved at trial.

SECOND CAUSE OF ACTION
FOR UNFAIR COMPETITION

(1) Plaintiff is a corporation incorporated under the laws under the State of Oregon having its principal place of business in the State of Oregon and Defendant The Greyhound Corporation is a corporation incorporated under the

laws of the State of Delaware, having its principal place of business in a state other than the State of Oregon, and Defendant Greyhound Lines, Inc. is a corporation incorporated under the laws of the State of California, having its principal place of business in a state other than the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

(2) Plaintiff realleges paragraphs 2, 3, 4, 5, 6, 7, 8, 11, 12, 13 and 14 of its First Cause of Action.

(3) Defendants acted willfully and maliciously and without justification for the purpose of injuring Plaintiff and destroying its business. In addition to general damages as proved, Plaintiff is entitled to punitive damages as proved.

THIRD CAUSE OF ACTION FOR UNFAIR COMPETITION

(1) This Court has jurisdiction under 28 USC 1331 (a), 1338(a)(b), 15 USC 1121 and 15 USC 1126(b), (h) and (i), this being a claim for unfair competition under the laws of the United States.

(2) Plaintiff realleges the allegations of paragraphs 2 and 3 of its Second Cause of Action, and 9 of its First Cause of Action.

WHEREFORE, Plaintiff prays:

(A) That the conduct of Defendants as alleged be adjudged and decreed unlawful.

(B) That judgment be entered against Defendants, and each [699] of them, for treble the amount of damages suffered by Plaintiff as a result of violations of the antitrust laws alleged herein and for attorney's fees and costs as required by Section 4 of the Clayton Act.

(C) For damages as proved for unfair competition and for punitive damages under its Second Cause of Action.

(D) For damages as proved for unfair competition under its Third Cause of Action and costs as required thereunder.

(E) For other relief as the Court shall deem proper.

RIVES, BONYHADI, HALL & EPSTEIN
BRUCE M. HALL
GEORGE K. MEIER III

BROAD, KHOURIE & SCHULZ
MICHAEL N. KHOURIE
EUGENE C. CREW
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff

Plaintiff demands trial by jury of all issues so triable in the above-captioned proceedings.

RIVES, BONYHADI, HALL & EPSTEIN
BRUCE M. HALL
GEORGE K. MEIER III

BROAD, KHOURIE & SCHULZ
MICHAEL N. KHOURIE
EUGENE C. CREW
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff [700]

[Certificate of service omitted in printing] [701]

United States District Court
for the District of Oregon

[Title omitted in printing]

Civil No. 68-374

ANSWER OF DEFENDANT GREYHOUND LINES, INC. TO THIRD AMENDED COMPLAINT

Defendant Greyhound Lines, Inc. answers plaintiff's third amended complaint as follows:

DEFENSES TO FIRST CAUSE OF ACTION

FIRST DEFENSE TO FIRST CAUSE OF ACTION

Plaintiff's first cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO FIRST CAUSE OF ACTION

1. Answering paragraph 1, defendant Greyhound Lines, Inc. admits that this action is instituted under § 4 of the Clayton Act (15 USC § 15). Defendant denies the remainder of paragraph 1.

2. Defendant denies paragraph 2.

3. Defendant admits paragraph 3. [702]

4. Defendant admits paragraph 4, except it avers that defendant The Greyhound Corporation discontinued the operation of scheduled common carrier passenger motor bus service on December 31, 1963, at which time it transferred its motor carrier operating rights and properties to this defendant.

5. Defendant admits paragraph 5, except it avers that it has engaged in the operation of scheduled common carrier passenger motor bus service since January 1, 1964.

6. Defendant admits paragraph 6, except it denies that it has violated the antitrust laws and further denies that the market to which plaintiff's allegations refer is the scheduled common carrier passenger motor bus service market within the Western United States.

7. Defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of averments contained in paragraph 7, except that defendant admits that plaintiff has held itself out to provide scheduled service from and between various points within Oregon, Idaho and Utah.

8. Answering paragraph 8, defendant admits it is the largest company engaged in passenger motor carriage in the United States. Defendant denies the remainder of paragraph 8.

9. Defendant denies paragraph 9.

10. Defendant denies paragraph 10.

11. Defendant denies paragraph 11, except: Defendant admits defendant The Greyhound Corporation acquired control of several formerly independent bus lines and merged them into its system and obtained the consent of the Interstate Commerce Commission for such acquisitions and mergers; defendant admits it has facilities for selling bus service; as to allegation (e), defendant admits that defendant The Greyhound Corporation dismissed a request to abandon service, that plaintiff applied for the rights being abandoned, and that defendant The Greyhound Corporation filed a protest against [703] plaintiff's application, and defendant admits it discontinued existing joint-line through bus operations with plaintiff for a period of time but has reinstituted the same.

12. Defendant denies paragraph 12.

13. Defendant denies paragraph 13, except that defendant admits and avers that plaintiff had knowledge and information with respect to the activities, actions, practices and policies of Defendant, and of Greyhound agents, to the extent applicable concerning the quoting of Plaintiff's services, inclusion of Plaintiff's services on schedules and maps, routing of traffic and instructions to agents.

14. Defendant denies paragraph 14.

THIRD DEFENSE TO FIRST CAUSE OF ACTION

All or part of plaintiff's first cause of action is barred by § 4B of the Clayton Act, 15 USC § 15B.

FOURTH DEFENSE TO FIRST CAUSE OF ACTION

The acquisitions of control and mergers of bus lines, selling agents, outlets and depots referred to in plaintiff's third amended complaint were authorized and approved by the Interstate Commerce Commission under § 5(2) of the Interstate Commerce Act, 49 USC § 5(2), and this answering defendant is relieved from the operation of the antitrust laws and all state laws insofar as necessary to carry the same into effect and to hold, maintain and operate said properties and to exercise any control and franchises thereby acquired under § 5(11) of the Interstate Commerce Act, 49 USC § 5(11).

DEFENSES TO PLAINTIFF'S SECOND CAUSE OF ACTION

FIRST DEFENSE TO SECOND CAUSE OF ACTION

Plaintiff's second cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO SECOND CAUSE OF ACTION

1. Defendant Greyhound Lines, Inc. admits paragraph 1.

2. Answering paragraph 2, defendant realleges the admissions, denials and averments in its *Second Defense to First Cause of Action* [704] as to paragraphs 2, 3, 4, 5, 6, 7, 8, 11, 12, 13 and 14 of plaintiff's first cause of action.

3. Defendant denies paragraph 3.

THIRD DEFENSE TO SECOND CAUSE OF ACTION

Part or all of plaintiff's second cause of action is barred by the applicable statute of limitations.

FOURTH DEFENSE TO SECOND CAUSE OF ACTION

Defendant realleges its fourth defense to plaintiff's first cause of action.

DEFENSES TO PLAINTIFF'S THIRD CAUSE OF ACTION

FIRST DEFENSE TO THIRD CAUSE OF ACTION

Plaintiff's third cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO THIRD CAUSE OF ACTION

1. Answering paragraph 1, defendant Greyhound Lines, Inc. denies that this court has jurisdiction or that plaintiff's third cause of action presents a Federal question or that any cause of action exists for unfair competition under the laws of the United States.

2. Answering paragraph 2, defendant realleges the admissions, denials and averments in its *Second Defense to*

First Cause of Action and in paragraphs 2 and 3 of its *Second Defense to Second Cause of Action* insofar as the same respond to averments incorporated by reference in plaintiff's Third Cause of Action. Defendant denies that any conduct of defendant has caused plaintiff irreparable damage.

THIRD DEFENSE TO THIRD CAUSE OF ACTION

Part or all of plaintiff's second cause of action is barred by the applicable statute of limitations.

FOURTH DEFENSE TO THIRD CAUSE OF ACTION

Defendant realleges its fourth defense to plaintiff's [705] first cause of action.

WHEREFORE, defendant Greyhound Lines, Inc. prays for judgment against plaintiff and for its costs.

McCOLLOCH, DEZENDORF, SPEARS & LUBERSKY
James C. Dezendorf
James H. Clarke

McCUTCHEN, DOYLE, BROWN & ENERSEN
William W. Schwarzer
John R. Reese
By /s/ JOHN R. REESE
Attorneys for Defendants [706]

[Certificate of service omitted in printing] [707]

United States District Court
for the District of Oregon

[Title omitted in printing]

Civil No. 68-374

ANSWER OF DEFENDANT THE GREYHOUND CORPORATION TO THIRD AMENDED COMPLAINT

Defendant The Greyhound Corporation answers plaintiff's third amended complaint as follows:

DEFENSES TO FIRST CAUSE OF ACTION

FIRST DEFENSE TO FIRST CAUSE OF ACTION

Plaintiff's first cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO FIRST CAUSE OF ACTION

1. Answering paragraph 1, defendant The Greyhound Corporation admits that this action is instituted under § 4 of the Clayton Act (15 USC § 15). Defendant denies the remainder of paragraph 1.

2. Defendant denies paragraph 2. [1140]

3. Defendant admits paragraph 3.

4. Defendant admits paragraph 4, except it avers that its principal place of business is in Phoenix, Arizona, and that on December 31, 1963, it discontinued the operation of scheduled common carrier passenger motor bus service and transferred its motor carrier operating rights and properties to defendant Greyhound Lines, Inc., which came into existence and commenced operations at that time.

5. Defendant admits paragraph 5, except it avers that defendant Greyhound Lines, Inc., has its principal place of business in Phoenix, Arizona and has engaged in the operation of scheduled common carrier passenger motor bus service since January 1, 1964.

6. Defendant admits paragraph 6, except it denies that it has violated the antitrust laws and further denies that the market to which plaintiff's allegations refer is the scheduled common carrier passenger motor bus service market within the Western United States.

7. Defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of averments contained in paragraph 7, except that defendant admits that plaintiff has held itself out to provide scheduled service from and between various points within Oregon, Idaho and Utah.

8. Answering paragraph 8, defendant admits that defendant Greyhound Lines, Inc. is the largest company engaged in passenger motor carriage in the United States. Defendant denies the remainder of paragraph 8.

9. Defendant denies paragraph 9.

10. Defendant denies paragraph 10.

11. Defendant denies paragraph 11, except: Defendant [1141] admits that it acquired control of several formerly independent bus lines and merged them into its system and obtained the consent of the Interstate Commerce Commission for such acquisitions and mergers; defendant admits that defendant Greyhound Lines, Inc., has facilities for selling bus service; as to allegation (e), defendant admits that it dismissed a request to abandon service, that plaintiff applied for the rights being abandoned, and that it filed a protest against plaintiff's application; and defendant admits that defendant Greyhound Lines, Inc.,

discontinued existing joint-line through bus operations with plaintiff for a period of time but has reinstituted the same.

12. Defendant denies paragraph 12.

13. Defendant denies paragraph 13, except that defendant admits and avers that plaintiff had knowledge and information with respect to the activities, actions, practices and policies of defendant and of Greyhound agents, to the extent applicable concerning the quoting of plaintiff's services, inclusion of plaintiff's services on schedules and maps, routing of traffic and instructions to agents.

14. Defendant denies paragraph 14.

THIRD DEFENSE TO FIRST CAUSE OF ACTION

All or part of plaintiff's first cause of action is barred by § 4B of the Clayton Act, 15 USC § 15B.

FOURTH DEFENSE TO FIRST CAUSE OF ACTION

The acquisitions of control and mergers of bus lines, selling agents, outlets and depots referred to in plaintiff's third amended complaint were authorized and approved by the Interstate Commerce Commission under § 5(2) of the Interstate Commerce Act, 49 USC § 5(2), and this answering defendant is relieved from the operation of the antitrust laws and all state [1142] laws insofar as necessary to carry the same into effect and to hold, maintain and operate said properties and to exercise any control and franchises thereby acquired under § 5(11) of the Interstate Commerce Act, 49 USC § 5(11).

DEFENSES TO PLAINTIFF'S SECOND CAUSE OF ACTION

FIRST DEFENSE TO SECOND CAUSE OF ACTION

Plaintiff's second cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO SECOND CAUSE OF ACTION

1. Defendant The Greyhound Corporation admits paragraph 1.

2. Answering paragraph 2, defendant realleges the admissions, denials and averments in its *Second Defense to First Cause of Action* as to paragraphs 2, 3, 4, 5, 6, 7, 8, 11, 12, 13 and 14 of plaintiff's first cause of action.

3. Defendant denies paragraph 3.

THIRD DEFENSE
TO SECOND CAUSE OF ACTION

Part or all of plaintiff's second cause of action is barred by the applicable statute of limitations.

FOURTH DEFENSE
TO SECOND CAUSE OF ACTION

Defendant realleges its fourth defense to plaintiff's first cause of action.

DEFENSES TO PLAINTIFF'S
THIRD CAUSE OF ACTION

FIRST DEFENSE TO THIRD CAUSE OF ACTION

Plaintiff's third cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO THIRD CAUSE OF ACTION

1. Answering paragraph 1, defendant The Greyhound [1143] Corporation denies that this court has jurisdiction or that plaintiff's third cause of action presents a Federal question or that any cause of action exists for unfair competition under the laws of the United States.

2. Answering paragraph 2, defendant realleges the admissions, denials and averments in its *Second Defense to First Cause of Action* and in paragraph 2 and 3 of its *Second Defense to Second Canse of Action* insofar as the same respond to averments incorporated by reference in plaintiff's Third Cause of Action. Defendant denies that any conduct of defendant has caused plaintiff irreparable damage.

THIRD DEFENSE TO THIRD CAUSE OF ACTION

Part or all of plaintiff's second cause of action is barred by the applicable statute of limitations.

FOURTH DEFENSE TO THIRD CAUSE OF ACTION

Defendant realleges its fourth defense to plaintiff's first cause of action.

WHEREFORE, defendant The Greyhound Corporation prays for judgment against plaintiff and for its costs.

Dated: June 27, 1972.

McCOLLOCH, DEZENDORF, SPEARS & LUBERSKY
James C. Dezendorf
James H. Clarke

McCUTCHEN, DOYLE, BROWN & ENERSEN
William W. Schwarzer
John R. Reese
/s/ By JOHN R. REESE
Attorneys for Defendants [1144]

[Certificate and acknowledgement of service omitted in printing] [1145] & [1146]

ALFRED T. GOODWIN [Letterhead]

UNITED STATES COURT HOUSE
PORTLAND, OREGON 97205

November 22, 1972

Messrs. Bruce M. Hall, George Meier, III
Rives, Bonyhadi, Hall & Epstein
1400 Public Service Building
Portland, Oregon 97204

Messrs. Michael N. Khourie, Eugene C. Crew
Broad, Khourie & Schulz
425 California Street, Suite 2404
San Francisco, California 94104

Messrs. James C. Dezendorf, James H. Clarke
McColloch, Dezendorf, Spears & Lubersky
8th Floor Pacific Building
Portland, Oregon 97204

Messrs. William W. Schwarzer, John R. Reese,
Kenneth Drexler
McCutchen, Doyle, Brown & Enersen
601 California Street
San Francisco, California 94108

Gentlemen:

Re: MT. HOOD STAGES, INC. etc. v.
THE GREYHOUND CORPORATION et al.

D. Or. Civ. No. 68-374

I have been unable to resolve scheduling conflicts caused by a change in date of the Ninth Circuit Symposium from

April to January, and accordingly must reschedule your trial to begin March 26, 1973.

Both sides have preserved in the record a request for jury trial, but both have expressed doubt about persisting in the request. The Clerk will need to know not later than February 1, 1973, whether there will be a jury. It will be helpful if you can advise me by January 1.

I indicated on October 19, 1972, that I would advise counsel of a number of rulings previously reserved for various reasons. In the interest of obtaining a pretrial [1354] order in final form, I now want to advise counsel of my rulings on the reserved questions. Most are self-explanatory; for convenience, I will follow the order in which the questions are listed in Mr. Clarke's proposed issues of law (page 25 of his proposed pretrial order).

A. The opinions and orders of the ICC and the District Court in Mt. Hood Stages, Inc., Petition for Modification—Greyhound Mergers, No. MC-F-9136:
   1. Do not give rise to collateral estoppel with respect to any issue of fact or law in this action;
   2. Are not admissible in evidence for any purpose.

B. Representations and testimony in earlier proceedings may have probative value on one or more issues, and will be received to the extent that they are relevant and not excludable as hearsay.

C. Evidence of consent decrees, or opinions, complaints, orders, or judgments in other cases will not be received.

D. I can conceive of no injunctive relief in this court that could not have been had in proper administrative proceedings, and, accordingly, request the plaintiff to omit such relief from the pretrial order.

E. I have concluded that the plaintiff's claim for damages for unfair competition is probably redundant, but I will allow the issue to remain in the case for the time being. If the plaintiff can present a factual situation within the pleadings that give rise to common-law damages and does not amount to anticompetitive conduct in violation of the antitrust laws, I am willing to submit it, but I see nothing in the proposed pretrial order to date that presents a triable issue on that theory.

F. Clayton Act statute of limitations.

1. Fraudulent concealment. I do not believe that sufficient facts appear at this time [1355] to say that fraudulent concealment is not in dispute and that Mt. Hood had reason on a specific date in history to know of facts that constituted a claim under the antitrust laws. After plaintiff rests, such a date, if any, probably can be determined.
2. The 5(b) exception. I believe the Congressional intent behind 5(b) is better served by treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them.

Accordingly, both parties should plan on the plaintiff's trying to prove, and the defendants' meeting, damages running back to the time Greyhound began to route passengers around Mt. Hood, if it did. If the case is tried to a jury, I will submit interrogatories based upon appropriate alternative dates, and if a jury is waived the segregation can be handled by findings so that, if the Circuit takes a different view, the matter can be remedied without a new trial on the damages issues.

G. If the pretrial order in its final form contains a viable pendente claim for common-law damages under Oregon law, I will treat it as controlled by the local law on limitations.

H. I have concluded that there can be no claim made on the theory of an intramural conspiracy. If separate corporations conspired, that is another matter. (A claim that officers of the holding company conspired with officers of the operating company does not appear to have support in the discovery to date.) As of now, I will order stricken any claims of Sherman Act violations by Greyhound Lines' officers conspiring among themselves. Claims of improper conduct between Greyhound and its independent agents, however, are presently a major part of the case.

I trust that the foregoing covers the pending questions upon which rulings are needed prior to the lodging of the [1356] pretrial order. If further matters require rulings prior to completion of the pretrial order, I will expect counsel to call them to my attention at an early date.

Yours very truly,

/s/ Alfred T. Goodwin
Alfred T. Goodwin
United States District Judge,
sitting as District Judge
by designation

ATG hm

Original to be filed with Clerk of the United States District Court for the District of Oregon [1357]

United States District Court
District of Oregon

[Title omitted in printing]

Civil No. 68-374

SPECIAL VERDICT

We, the jury, answer the interrogatories as follows:

1. Do you find from the evidence that defendants or either of them violated Section 1 of the Sherman Act?

YES	NO
✓	

2. Do you find from the evidence that defendants or either of them violated Section 2 of the Sherman Act?

YES	NO
✓	

If the answers to Nos. 1 and 2 are *both* "no", you need not answer any further questions.

3. If the answer to Nos. 1 or 2 is "yes", do you find that such violations were fraudulently concealed [2248] by defendants, from plaintiff:

(a) during the period January 1, 1953, to December 14, 1960?

YES	NO
✓	

(b) during the period December 15, 1960 to July 4, 1964?

YES	NO
✓	

4. If the answer to No. 3 (a) or (b) is "yes", please state the date prior to July 5, 1964, which, under the instructions I have given you, you find was the time plaintiff knew or should have known of this violation:

Dec. 14, 1960 (DATE)

5. If the answer to Nos. 1 or 2 is "yes", do you find that plaintiff was injured by such violations of the antitrust laws?

YES	NO
✓	

6. If you answer question 5 "yes", then fill in for each of the following periods the amount of damages if any sustained in that period:

July 5, 1964, to March 25, 1973	Amount	$2,650,491
December 15, 1960 to July 5, 1964	Amount	$ 626,482
January 1, 1953, to December 15, 1960	Amount	$1,105,057

Dated this 2nd day of May, 1973.

/s/ NORA O. PIRRIE
Foreman of the Jury [2249]

United States District Court
District of Oregon

[Title omitted in printing]

CIVIL NO. 68-374

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL AND TO STRIKE CERTAIN EVIDENCE

Defendants The Greyhound Corporation and Greyhound Lines, Inc., hereby move this Court for judgment notwithstanding the verdict or, alternatively, for a new trial, and to strike certain evidence.

Defendants move the Court for an order setting aside the verdict heretofore entered in this action and for judgment in favor of the defendants in accordance with defendants' previous motion for directed verdict on each of the following grounds: [2256]

1. The conduct complained of herein by plaintiff, is immune from the operation of the antitrust laws by reason of Section 5(11) of the Interstate Commerce Act (49 U.S.C. § 5(11)).

2. The jurisdiction of this Court over the conduct complained of, is preempted by the Interstate Commerce Commission's jurisdiction over this same conduct.

3. There is no evidence from which the jury could properly find a violation of Section 1 of the Sherman Act.

4. There is no evidence from which the jury could properly find a violation of Section 2 of the Sherman Act.

5. There is no evidence from which the jury could properly find that plaintiff was injured in its business or property by reason of a violation of Sections 1 or 2 of the Sherman Act.

6. There is no evidence from which the jury could properly find that defendants' violations, if any, had been fraudulently concealed from plaintiff at any time relevant herein.

7. That all claims arising prior to July 5, 1964 are barred by the provisions of Section 4B of the Clayton Act (15 U.S.C. § 15b).

In the alternative, defendants move this Court for an order setting aside the verdict herein and granting a new trial of this action for the reasons set forth above and for the further reason that prejudicial error was committed by the admission of certain evidence, by the giving of certain instructions and by the refusal to give certain other instructions.

Defendants further move to strike certain exhibits offered by plaintiff and received in evidence on the ground that they are prejudicial and are not supported by the evidence.

The above motions are based upon Rules 50(b) and 59 [2257] of the Federal Rules of Civil Procedure, the memorandum of points and authorities to be filed hereafter and on the files and records in this action.

Dated: May 8, 1973.

DEZENDORF, SPEARS, LUBERSKY & CAMPBELL
McCUTCHEN, DOYLE, BROWN & ENERSEN
By /s/ JOHN R. REESE
Attorneys for Defendants [2258]

[Certificate and acknowledgement of service omitted in printing] [2259] & [2260]

In the United States District Court
for the District of Oregon

Civ. No. 68-374

Mt. Hood Stages, Inc., doing
business as Pacific Trailways,
Plaintiff,

v.

The Greyhound Corporation and
Greyhound Lines, Inc.,
Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Alfred T. Goodwin presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that plaintiff, Mt. Hood Stages, Inc., doing business as Pacific Trailways, recover of the defendants, The Greyhound Corporation and Greyhound Lines, Inc., the sum of $13,146,090 with interest thereon at the rate of six per cent as provided by law, and for its costs, and for its reasonable attorneys' fees to be set after a hearing upon the conclusion of all posttrial motions in this court.

DATED at Portland, Oregon, this 11th day of May, 1973.

/s/ Alfred T. Goodwin
United States Circuit Judge sitting
as District Judge by Designation
[2261]

In the United States District Court
for the District of Oregon

Civ. No. 68-374

Mt. Hood Stages, Inc., doing
business as Pacific Trailways,
Plaintiff,

v.

The Greyhound Corporation
and Greyhound Lines, Inc.,
Defendants.

• • •

[Filed November 30, 1973] [2874]

GOODWIN, Judge:*

Greyhound has moved for a judgment notwithstanding the verdict and for a new trial in this treble-damage antitrust action which resulted in a verdict and judgment for Mt. Hood Stages. The principal issue is whether *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363 (1973), compels a judgment n.o.v.

Greyhound asserts:

(1) The action is barred by Section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11);

(2) There was insufficient evidence (of conspiracy and of monopolization) to sustain the verdict;

(3) A new trial should be granted because of the numerous errors of law in the taking of evidence and in the instructions to the jury.

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*The Honorable Alfred T. Goodwin, United States Circuit Judge, sitting as District Judge by designation.

All of these contentions rehearse issues which were briefed and argued extensively at trial and in hearings before trial. Now, as then, the law and the facts of this case are such that the issues must be resolved against the defendants. If there was error here or there in an evidentiary ruling, none was so prejudicial as to warrant the abortion of a lengthy trial. *See* Fed. R. Civ. P. 61.

The evidence revealed long-standing, calculated, and damaging conduct which, but for Section 5(11) of the Interstate Commerce Act, plainly would have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

Mt. Hood proved, *inter alia,* that Greyhound had: (1) directed independent and joint ticket agents to long-haul traffic around Mt. Hood; (2) interfered with the distribution of Mt. Hood's schedules; (3) scheduled connecting service so as to preclude reasonable connections [2875] with Mt. Hood; and (4) discontinued through bus service important to Mt. Hood's scheduled routes.

The I.C.C. and reviewing courts have found that Greyhound willfully breached earlier representations made to the Commission in acquisition proceedings and engaged in destructive competition.[1] The destructive practices established by the record before the Commission were enjoined by a three-judge panel of a district court,[2] and Greyhound was subsequently held in criminal contempt for violating that injunction.[3] I mention these collateral cases, not because I relied upon them in this case, but because they establish two points that do have some relevance to policy considerations that bear upon this case.

1. See, *e.g.*, Petition for Modification—Greyhound Mergers (Western Div.), 104 M.C.C. 449 (Div. 3, 1968); I.C.C. Affirmance of the Order of Division 3, No. MC-F-9136 (Dec. 11, 1968; April 14, 1969); *Greyhound Lines, Inc. v. United States,* 301 F. Supp. 356 (N.D. Ill. 1969) (denying motion for temporary restraining order).

2. *Greyhound Lines, Inc. v. United States,* 308 F. Supp. 1033 (N.D. Ill. 1970).

3. *United States v. Greyhound Corp.,* No. 71-CR-924 (N.D. Ill., June 27, 1973).

In the first place, the litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct. If Congress intended the Interstate Commerce Act to provide a remedy for competitors injured by predatory behavior on the part of regulated carriers, then the legislation is woefully inefficient. Second, if proof outside the abundant proof in this record were needed, the collateral cases strip away any pretense that Greyhound's conduct toward its competitors was simply the result of good-faith aggressive management. The costs to Greyhound of the prolonged litigation before the Commission apparently have been more than offset by the profits Greyhound has derived by flouting the Commission's cease-and-desist orders. If there was ever a case in which a private action for damages is demonstrably necessary to carry out national antitrust policy, this is it.

Section 5(11) of the Interstate Commerce Act obviously is the key issue. That section provides, in relevant part: [2876]

> "• • • [A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction • • •." 49 U.S.C. § 5(11).

The effect of a similar statute on the antitrust liability of a supplier of airline equipment was recently decided by the Supreme Court in *Hughes Tool Co. v. Trans World Airlines, supra.* When an agency, with the authority to immunize transactions from the operation of the antitrust laws, necessarily considers the public interest and approves conduct explicitly or implicitly before the agency as part of a proposed transaction, such conduct is thereby made immune from antitrust liability.

Mt. Hood poses the "flip side" of the *Hughes Tool* question: where a regulating agency with the authority to immunize conduct from the operation of the antitrust laws has not approved the conduct complained of, and indeed has ordered it stopped, does the approval by the agency of related transactions and the existence of a pervasive regulatory scheme, including the availabality of some remedy, adequate or not, under that scheme preclude antitrust liability? I hold that it does not. *See Hughes Tool Co. v. Trans World Airlines,* 409 U.S. at 387:

> "We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws." [2877]

The Supreme Court has repeatedly made it clear that repeal of the antitrust laws is not to be lightly assumed. *See, e.g., Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350 (1963); *Georgia v. Pennsylvania R.R.,* 324 U.S. 439, 456-57 (1945). *See also Price v. Trans World Airlines,* 481 F.2d 844 (9th Cir. 1973) (post-*Hughes Tool Co.* antitrust action stayed pending resort to Civil Aeronautics Board).

Mt. Hood is not here seeking the kind of relief that could be provided by the I.C.C.[4] That kind of relief has been sought, and for nearly ten years has proven to be illusory. Here Mt. Hood is seeking only the antitrust remedy of treble damages, relief that can be granted only in court and which is supplemental to those administrative remedies which could be ordered by the I.C.C.

The antitrust issues raised by Greyhound's conduct were not considered or passed upon by the Commission in the initial acquisition proceedings. Were this court to hold that merely because the I.C.C. has authority to approve acquisitions, routes and schedules and order some relief with respect to some of the conduct complained of Congress had thereby placed exclusive jurisdiction in the I.C.C. over all conduct related to the approved transactions, this would amount to an almost total exemption of a carrier's conduct from the antitrust laws. Rather, all that *Hughes Tool* teaches is that the substantive exemptions from the antitrust laws created by Congress or required by the structure of the regulatory scheme are not destroyed through by-passing or overriding the forum chiefly entrusted with the regulation of the industry in question. *See REA* [2878] *Express v. Alabama Great So. Ry.,* 412 U.S. 934 (1973) (affirming a three-judge court's *stay* of an antitrust suit pending I.C.C. reconsideration of a prior financing arrangement order on the issue of possible antitrust immunity).

A court's antitrust jurisdiction is ousted only when the specified agency, pursuant to its statutory authority, approves the challenged actions. If an agency thus grants an

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4. See 49 U.S.C. §§ 9, 16. Though the I.C.C. has jurisdiction to award damages, this power is limited to cases in which damages result from activity which can be classified as a violation of the Interstate Commerce Act. *National Trucking & Storage Co. v. Pennsylvania R.R.,* 228 F.2d 23, 30 (D.C. Cir. 1955).

exemption from the antitrust laws, that determination is binding unless a court should set it aside for one of the reasons enumerated in Section 10(e) of the Administrative Procedure Act.[5] By the same token, however, conduct which not only has not been expressly approved but which has been expressly disapproved by the agency ought then to be subject to antitrust remedies supplemental to those which could have been granted by the agency.

A contrary decision would not only be an unsound reading of legislative intent, but would also be impractical. It would foreclose from the courts the option of utilizing primary jurisdiction, a technique which does not preclude a later judicial antitrust proceeding should the agency first determine that the complained-of acts were not immunized. *Cf. Ricci v. Chicago Mercantile Exchange,* 409 U.S. at 305-06; *Federal Maritime Board v. Isbrandtsen Co.,* 356 U.S. 481, 498-99 (1958). Greyhound's reading of Section 5(11) would place upon the I.C.C. the impossible burden of anticipating and ruling upon all the possible antitrust implications of all conduct conceivably related to any transaction subject to I.C.C. approval at the risk of subsequently being held to have conferred a blanket antitrust immunity.

In my other rulings, and in rejecting various proposed instructions, I tried to state my reasons as the case [2879] progressed. Accordingly, I will not extend this Memorandum by repeating those reasons here.

IT IS ORDERED:

(1) The motion for judgment notwithstanding the verdict is denied;

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5. *E.g.,* 5 U.S.C. § 706(2):
"(A) arbitrary, capricious, an abuse of discretion • • •;
"(B) contrary to constitutional right • • •;
"(C) in excess of statutory jurisdiction • • •;
"(D) without observance of procedure required by law;
"(E) unsupported by substantial evidence • • •;
" • • • • • • ."

(2) The motion for a new trial is denied;

(3) The court will hear counsel on the matter of attorney's fees at 10:00 a.m., December 14, 1973.

DATED this 29th day of November, 1973.

/s/ ALFRED T. GOODWIN
Alfred T. Goodwin
United States Circuit Judge,
sitting as District Judge
by designation. [2880] & [2881]

In the United States District Court
for the District of Oregon

[Title omitted in printing]

Civil No. 68-374

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S PETITION FOR ALLOWANCE OF ATTORNEYS' FEES [2882]

• • •

INTRODUCTION

Plaintiff on May 17, 1973 filed its Petition for Allowance of Attorneys' Fees in the amount of $1,971,900, and in accordance with the Court's direction, for such additional attorneys' fees as the Court would award following post-trial motions. This request represents approximately 15% of the face amount of the judgment of $13,146,090, and approximately 45% of the jury verdict of $4,382,030. Plaintiff has now supported its Petition with the filing of (1) affidavits narrating time spent by plaintiff's counsel in preparing and presenting the case; (2) time sheets and time summaries; (3) biographical data regarding plaintiff's counsel; and (4) the files and records in the case.

APPLICABLE LAW

Section 4 of the Clayton Act provides in pertinent part:

> "Any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

While the basis of attorney's fee awards for any case must ultimately rest within the sound discretion of the trial court,[1] these criteria have been applied with consistency within this Circuit:[2]

> "(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government; (2) the standing of the counsel at bar; (3) time and labor spent; (4) magnitude and complexity of the litigation; (5) responsibility undertaken; (6) the amount recovered; (7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial; (8) what it would be reasonable for counsel to charge a victorious plaintiff; and (9) what contribution shall be made by the defendant toward the fees of plaintiff's counsel." [2884]

STATISTICAL FRAME OF REFERENCE

These proceedings were commenced by the filing of Plaintiff's Complaint on July 5, 1968. Through November 30, 1973 plaintiff's counsel has expended in the prosecution of this action in excess of 10,190 hours (See Exhibit A). The docket sheets (Exhibit C) reflect at least twenty court appearances before this Court and The Honorable Gus J. Solomon. During discovery at least 41 depositions were taken in various of the Western states, some of considerable length. The deposition of William A. Niskanen took ten

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1. This Circuit has recently noted the "special competence" of the trial judge in the award of attorneys' fees at the trial court level. *Perkins v. Standard Oil of California,* CA-9, 1973 Trade Cases, 93,765, 93,767.

2. *Twentieth Century Fox Film Corp. v. Goldwyn,* [1964 Trade Cases ¶ 71,010], 328 F.2d 190, 221 (9th Cir. 1964), cert. denied, 379 U.S. 880; cited in *Clyde A. Perkins v. Standard Oil Company of California, supra.*

days alone, and is evidenced by nine volumes of deposition transcript. The deposition of Harry Drew covered seven volumes. Over 23,000 documents were examined by plaintiff's counsel in defendants' offices in San Francisco, Oakland, Seattle, Chicago, Evanston, Eugene and Medford from which some 500 were winnowed out for presentation in a jury trial. Because of the incompleteness of defendants' records (See Defendants' Objection to Interrogatory No. 2, Answers to Plaintiff's Second Set of Interrogatories which are attached hereto as Exhibit D) plaintiff was obliged to undertake, with outside expert assistance, difficult and complex traffic studies. These included monitoring, pursuant to Court Order, of defendant's driver's envelopes and ticket stubs through key gateways for a period of 12 months. The damage study submitted to the jury (Exhibit 476), itself the product of detailed sub-schedules, contained 62 pages. Trial was, at defendants' insistence,[1] by jury, and took 28 trial days, 6807 pages of transcript. The briefs of the parties in Defendants' Motion for Judgment Notwithstanding the Verdict or, in the alternative, for New Trial are the most recent indication of the magnitude of this [2885] case. Defendants' opening brief encompassed 139 pages; plaintiff's answering brief 288 pages, plus two detailed exhibits; and defendants' reply brief 112 pages.

ARGUMENT

We would now apply the foregoing recognized criteria to these proceedings:

(1) *Whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government.*

1. Defendants' letter to the Court filed December 19, 1972; plaintiff's Waiver of Jury trial filed December 11, 1972.

Although many decisions have been rendered by the I.C.C. and the U. S. District Court in Chicago against these defendants, nevertheless, and as a direct result of their completely successful opposition to plaintiff's continuing efforts to obtain collateral estoppel or even an effect as limited admissions of fact as to matters directly determined in those cases, defendants must be the first to admit that plaintiff's counsel obtained no benefits therefrom.

(2) *The standing of counsel at bar.*

The standing and experience of plaintiff's counsel has, at least as to the appellate proceedings, been subject in this Circuit to careful scrutiny. *Perkins v. Standard Oil Company of California,* 474 F.2d 549, (1973). For this reason, there is appended hereto as Exhibit E, a summation of the background and experience of plaintiff's principal attorneys in this highly specialized area of practice. As to their industry and perseverance, plaintiff's attorneys are hopeful that the docket sheet in this case, attached hereto as Exhibit C, may serve as a reminder of the unrelenting skirmishes and battles on the way to the ultimate jury verdict.

As to opposing counsel, although modesty in this instance may forbid, the firms of McCutchen, Doyle, Brown & Enersen of San Francisco, California and Dezendorf, Spears, Lubersky & Campbell [2886] of Portland, are preeminent amongst antitrust defense counsel in their respective areas of service. Each firm is large, resourceful, determined and experienced, as this Court has had occasion to observe on numerous occasions.

(3) *Time and labor spent.*

The time fairly spent on this case is as set forth in Exhibit B. We would only note herein that both parties

have undergone the same difficulty in having the place of trial in Portland, separated by considerable distance from the principal location of much of the evidence and of lead counsel in San Francisco. Plaintiff's counsel have, as indicated by the affidavits attached hereto, following the pledge of Herbert M. Schwab in the letter of engagement of July 1, 1968[1] taken the greatest pains to husband their limited time and resources against far larger opponents in order to most effectively prepare and present their claims before a jury.

(4) *Magnitude and complexity of the litigation.*

This Court has had occasion to remark upon the complexity and magnitude of the issues at bar.[2] These issues, while not possessing the novelty claimed for them by defendants in dramatizing their defense, nonetheless, particularly as to the Section 2 monopolization charges, have required the most careful consideration.

(5) *Responsibility undertaken.*

Plaintiff's counsel undertook a grave responsibility in this case. Mt. Hood Stages has been under a virtual state of seige by these defendants, and the evidence rather dramatically supports the thesis that the survival of this company has been very much [2887] intertwined with the continuing viability of the Central Oregon region as an economic entity. Mt. Hood Stages is the principal public transportation bridge for this region into the outside world. This company represented the last, and perhaps the only,

1. "We will of course work together closely, and avoid unnecessary duplication of effort."

2. Exhibit K, at Tr. 6796.

contestant in the Pacific Northwest with the will to fight and to win against Greyhound's monopoly power. The realization of the importance of Mt. Hood's stubborn stand provided impetus to the vigorous prosecution by the Interstate Commerce Commission and the Department of Justice of enforcement proceedings against Greyhound following the Chicago's Court's determination in the Modification case.

The foregoing considerations bring to mind the observation of the Ninth Circuit in *Flintkote Company v. Lysfjord,* 246 F.2d 268 (9th Cir. 1956), *cert.den.* 256 U.S. 835 (1959) in considering the contribution of the private litigant to the antitrust enforcement scheme:

> "The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the government in enforcing the antitrust laws."

6. *The amount recovered.*

The trebled award of $13,146,090 was based upon a jury verdict of $4,382,030. As has been previously pointed out the attorneys' fees requested of $1,971,900 represents approximately 15% of the face amount of the judgment and approximately 45% of the jury verdict. As likewise earlier noted, these percentages may be compared to the attorneys' fee award of $289,000 in *Clyde A. Perkins v. Standard Oil Company of California,* Civil No. 369-59 on May 14, 1964 which award amounted to 86% of the single damages jury verdict and more than 28-12% of the treble damage judgment. Such award was confirmed in *Perkins v. Standard Oil Company of California,* (1969 Trade Cases ¶ 72,822), 395 U.S. 642 (1969). The present request, making allowance for the larger award in this case, is therefore well within the experience of this District. [2888]

(7) *The knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial.*

This criterion is one upon which plaintiff believes it can fairly rely. The work required to attain success in this case was certainly of epic proportions, at least from plaintiff's point of view, and plaintiff's burden was not eased by defendants' insistence upon a jury trial. The record is "in evidence", and, we submit, speaks for itself. If defendants sincerely hold that this was "a case that should never have been tried", then they particularly will not gainsay plaintiff its claim to a singular accomplishment.

(8) *What it would be reasonable for counsel to charge a victorious plaintiff.*

This Court is well aware of the contingent fee schedules in the States of Oregon and California, each of which, absent some contribution by plaintiff to its attorneys' overhead and expenses, would command fee percentages of two or three times that requested here. See Exhibit G. Plaintiff has, in its view, liberally discounted the effect of a partial retainer upon the normal contingent fee percentage received in civil cases. Plaintiff is prepared, if necessary, to present expert testimony as to this criterion.

(9) *What contribution shall be made by the defendant toward the fees of plaintiff's counsel.*

The Court now has before it as Exhibit F, plaintiff's fee arrangement with its counsel. The amount requested there is less that one-half the payment plaintiff will make to its counsel in the event it is ultimately successful. As Judge Wyzanski stated in *Cape Cod Food Products v. National Cranberry Association,* 119 F.Supp 242, 244 (D.Mass. 1954). [2889]

> "[A] losing defendant must pay what it would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer. Sometimes the figure may seem high but so far as price is determined by unique excellence or by social usefulness, the advocate is especially worthy of larger recompense."

CONCLUSION

It is universally recognized that the award of a reasonable attorneys' fee at the conclusion of a successful prosecution of a private antitrust treble damage action must rest ultimately in the discretion of the trial court,[1] with due consideration given to the various factors enunciated for guidance within this Circuit in *20th Century Fox v. Goldwyn,* supra, as noted with approval this year in *Perkins v. Standard Oil Company of California,* supra.[2890] This Court has stated in its opinion of November 30, 1973: "If there was ever a case in which a private action for damages

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1. While the applicable standards have been consistently observed, the award itself must necessarily vary with the degree of prominence of one or more criteria. In *Alpine Pharmacy, Inc., et al v. Chas. Pfizer & Co., Inc., et al,* 481 F.2d 1045 (1973), the Second Circuit commented:

> "In the end, no mathematical formula, or precise weighing of specific factors is necessary, nor often desirable. In fact, there is no requirement that each of the listed criteria be taken into account, only that the final award be reasonable under the circumstances of the case.
>
> "As one commentator has noted, 'there are nearly as many notions of what is reasonable as there are judges.' Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L.Rev. 363, 412 (1954)."

To the same effect is "Attorneys' Fees in Individual and Class Action Antitrust Litigation", 60 California Law Review 1656 (1972), wherein the writer has collected and analyzed numerous attorneys' fees awards, and has observed: "Indeed it seems there are almost as many notions of what is reasonable as there are judges."

is demonstrably necessary to carry out national antitrust policy, this is it." Plaintiff submits that upon considerations of public policy and of the effort expended herein its request for its attorneys' fees for the trial of this cause is reasonable.

Respectfully submitted,

HALL & NOVACK
BROAD, KHOURIE & SCHULZ
/s/ By BRUCE M. HALL
BRUCE M. HALL [2891]

[Certificate of service omitted in printing] [2892]

TESTIMONY OF MAXWELL BLECHER GIVEN DECEMBER 20, 1973 (Tr. 6818-6819)

"Q. . . . I ask you as to the first criteria: Whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government?

A. The question is whether I have considered that?

Q. Yes, and what weight did you give to it, if any?

A. Yes, I have considered it. . . . [Tr. 6818]

• • •

My review of the record in this case indicates that not only did the plaintiff not have the benefit of any prior Government adjudication, but, in fact, this record formed the basis of a concomitent proceeding before the Interstate Commerce Commission in which the anti-trust division convened, and in which it secured a contempt citation for the conduct involved.

So that I think actually, here, you had no benefit from what the Government did, but you were simultaneously preparing the Government case in the private case.[Tr. 6819]

PORTION OF MT. HOOD CLOSING ARGUMENT AT HEARING RE ATTORNEYS' FEES December 20, 1973 (Tr. 6893-6894)

". . . this private action did a tremendous job of enforcement and, in fact, has caused the Government to act rather than the reverse and the Government has acted and a crimina [Tr. 6893] conviction has been obtained." [Tr. 6894]

In the United States District Court
for the District of Oregon

Civ. No. 68-374

Mt. Hood Stages, Inc., doing
business as Pacific Trailways,

Plaintiff,

v.

The Greyhound Corporation
and Greyhound Lines, Inc.,

Defendants.

MEMORANDUM AND ORDER ON ATTORNEY FEES [3271]

After reviewing the file, the exhibits offered in support of the claim for attorney fees, and all the evidence offered by both parties on the question of a reasonable attorney fee, I have concluded that compensation at an hourly rate would be inadequate in a case of this kind.

I have considered all of the factors Judge Hamley enumerated in *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964), and have given weight to all of them. I believe that this case is, in many ways, unusual, and that its complexity and difficulty set it somewhat apart from the common run of antitrust cases, if such a category in fact exists.

I will not attempt to go through the figures, or the evaluation process, by assigning cash value to the various elements. Rather, I have decided to give substantial effect to the result achieved, and to the other factors in the perspective of the four years I have known the case in all its details. I have concluded that a reasonable fee to be assessed

against the defendant is the sum of $1,250,000. The attorney's fee is to bear interest at the statutory rate for judgments until paid.

The Clerk will draw and submit for my signature a final judgment, accordingly in the total sum of $14,396,090.00, plus costs to be taxed.

/s/ ALFRED T. GOODWIN
United States Circuit Judge,
sitting as District Judge
by designation. [3272]

In the United States District Court
for the District of Oregon

Civil No. 68-374

Mt. Hood Stages, Inc., doing
business as Pacific Trailways,

Plaintiff,

vs.

The Greyhound Corporation
and Greyhound Lines, Inc.,

Defendants.

AMENDED JUDGMENT

Based upon the court's order entered contemporaneously herewith,

IT IS CONSIDERED AND ORDERED that the plaintiff MT. HOOD STAGES, INC. have and recover judgment against the defendants THE GREYHOUND CORPORATION and GREYHOUND LINES, INC., and each of them, in the amount of $14,396,090.00, together with interest at the rate of six percent on the sum of $13,146,090.00, from May 11, 1973 to this date, plus costs to be taxed.

IT IS FURTHER ORDERED that this judgment supersede and replace the judgment herein entered on May 11, 1973, and that the sum of $14,396,090.00 will bear interest at the rate of six per cent as provided by law from the date hereof until paid.

DATED this 21st day of December, 1973.

/s/ Alfred T. Goodwin
United States Circuit Judge,
sitting as District Judge
by Designation [3273]

United States District Court
for the District of Oregon

[Title omitted in printing]

Civil No. 68-374

NOTICE OF APPEAL

Notice is hereby given that defendants The Greyhound Corporation and Greyhound Lines, Inc., appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in favor of plaintiff entered herein on May 14, 1973, and from the amended judgment entered herein on December 21, 1973, and from all pretrial, interlocutory and post-trial orders herein.

Dated: December 26, 1973.

Dezendorf, Spears, Lubersky &
Campbell
James C. Dezendorf
James H. Clarke
McCutchen, Doyle, Brown &
Enersen
William W. Schwarzer
John R. Reese
By /s/ James H. Clarke
Of Attorneys for Defendants [3275]

United States Court of Appeals,
Ninth Circuit.

Mt. Hood Stages, Inc., dba Pacific Trailways, Plaintiff-Appellee,

v.

The Greyhound Corporation and Greyhound Lines, Inc.,

Defendants-Appellants.

No. 74-1282.
June 9, 1977.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING and WRIGHT, Circuit Judges, and LINDBERG,* District Judge.

BROWNING, Circuit Judge:

Greyhound Corporation and Greyhound Lines, Inc., appeal from a judgment entered on a jury verdict awarding damages to Mt. Hood Stages, Inc., for injuries resulting from violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[1] We affirm.

I.

Immunity

Greyhound is the largest common carrier by bus of passengers and package express in the United States, moving more than 80 percent of this traffic in the western states

*Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

1. The judgment was for $13,146,090 (after trebling) and attorneys' fees of $1,250,000, plus costs.

and operating over routes throughout the country. Mt. Hood is one of Greyhound's small competitors, operating over routes in Oregon, Idaho, and Utah. The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or "bridge" traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor.

Greyhound does not deny the sufficiency of the evidence to establish a violation of sections 1 and 2 of the Sherman Act, assuming that statute applies. Its principal contention is that Mt. Hood bases its claim upon acquisitions approved by the Interstate Commerce Commission and implementation by Greyhound of control over the acquired companies, and that such activities are immune from antitrust attack by virtue of section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), applied in light of the Supreme Court's analysis in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), provides that one carrier may acquire another with Commission approval; the Commission is required to grant such approval, subject to any terms and conditions it deems reasonable, if the acquisition "will be consistent with the public interest," *id.* Section 5(11) provides that carriers participating in transactions approved by the Commission are "relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

From 1947 to 1956 Greyhound acquired eight bus companies operating in the area relevant here. Each acquisition was approved by the Commission pursuant to section 5(2). Mt. Hood opposed four of the acquisitions. It argued that if the acquisitions were approved, Mt. Hood would be encircled and Greyhound could route traffic around it, depriving the public of the most convenient service and Mt. Hood of revenues necessary to its survival. Mt. Hood's argument to the Commission thus foreshadowed its present antitrust claim.

Greyhound responded by representing to the Commission that the acquisitions "would not adversely affect connecting carriers; that arrangements with such carriers, including interchange of traffic and open gateways, would be maintained; that it was not the policy of Greyhound to route passengers over circuitous routes; that its agents were instructed to quote the direct route as well as the Greyhound route and give passengers their choice; and that Greyhound had always carried [Mt. Hood's] schedules in its folders and cooperated in every way to acquaint the public with its service and thus promote additional traffic and business for their lines."[2] Greyhound also represented to the Commission that Greyhound would continue a joint through-bus arrangement with Mt. Hood.[3] As the Commission later

2. The quotation is from the Commission's opinion in the section 5(9) proceedings, described later. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 452 (1968).

3. This agreement, initiated in 1949, provided for a through-bus from San Francisco, California, to Spokane, Washington, using Mt. Hood's bridge route between Klamath Falls and Biggs, Oregon. Revenue and expenses were shared according to the miles traveled over each company's route. The arrangement shortened the San Francisco-Spokane trip by 110 miles and several hours as compared with the all-Greyhound route via Portland. It provided better service to travelers and was profitable for both companies.

found, Greyhound intended the Commission to rely upon these representations in determining whether the proposed acquisitions were in the public interest, and the Commission did in fact rely upon them in approving the acquisitions.

In 1964 Mt. Hood filed a petition with the Commission pursuant to section 5(9) of the Act, 49 U.S.C. § 5(9),[4] asking it to reopen the acquisition proceedings and enter a supplemental order requiring Greyhound to live up to its representations. The allegations in Mt. Hood's petition to the Commission were essentially the same as those Mt. Hood later made in this antitrust suit—namely, that Greyhound had cancelled the through-bus connection, had scheduled connecting service so as to preclude reasonable connections with Mt. Hood, had directed Greyhound's agents and independent joint ticket agents to send traffic by longer routes around those of Mt. Hood, and has interfered in various ways with the distribution of Mt. Hood's schedules and the quotation of Mt. Hood's rates and services, all with the intent of injuring Mt. Hood. The United States intervened in support of Mt. Hood.

After an extensive evidentiary hearing, a hearing examiner resolved all issues against Greyhound and recommended entry of the order sought by Mt. Hood. In April, 1968, the Commission issued an opinion sustaining the examiner's findings that Greyhound had made the representations alleged, that Greyhound had intended the Commission to rely on them, that the Commission had relied on them in approving the acquisitions, that Greyhound had

4. Section 5(9) reads:

Supplemental orders by Commissions.—The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

not fulfilled the representations, and that Greyhound's actions "were inspired by a desire to stiffle competition" and "injure or destroy" Mt. Hood. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 459-63 (1968). The Commission concluded that Greyhound's failure to abide by its commitment "constitutes destructive competition in contravention of the national transportation policy, is not consistent with the public interest, and provides good cause" for a supplemental order under section 5(9) of the Act. The Commission deferred entry of a supplemental order to allow voluntary negotiations between the parties. *Id.* at 462-63.

Two months later, in July, 1968, Mt. Hood filed this suit alleging violations of the antitrust laws and common law and statutory unfair competition. With respect to the antitrust violations the complaint alleged that, beginning in 1947 and continuing to the date of the complaint, Greyhound had restrained and monopolized commerce in the carriage of passengers and their luggage between points in Oregon, Idaho, and Utah by means essentially the same as those that were the subject of the Commission's proceeding; that is, the acquisition of independent bus lines with Commission consent obtained by the misrepresentations outlined by the Commission and thereafter engaging in the destructive competitive tactics found by the Commission. Greyhound sought, unsuccessfully, to eliminate these issues from the litigation on the ground that they fell within the exclusive jurisdiction of the Commission.

In the Commission proceedings, meanwhile, the efforts of the parties to agree upon an order failed. The Commission entered its own order requiring Greyhound to restore the practices and traffic patterns existing when the acquisitions at issue were authorized, and, specifically, to restore the joint through-bus service, to revise Greyhound's schedules to permit reasonable connections with Mt. Hood, to see that through routes and fares were quoted and quoted accurately, and to eliminate other destructive practices. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1037 (N.D. Ill. 1970). A three-judge district court affirmed the Commission and issued its own order in similar terms. *Id.* at 1040-41. Following entry of the district court order enforcing the Commission decision, Mt. Hood amended the complaint in this antitrust proceeding to eliminate the prayer for injunctive relief.

In June, 1971, the United States and the Commission filed petitions with the district court in the enforcement proceeding, asking that Greyhound be held in contempt for failing to comply with the court's order enforcing the Commission's decision. The court found Greyhound had willfully failed to comply with portions of the order and held Greyhound in criminal and civil contempt. *United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D.Ill. 1973). The court imposed fines totaling $600,000, *United States v. Greyhound Corp.*, 370 F.Supp. 881, 883-85 (N.D.Ill. 1974), ordered Greyhound to file semiannual reports of compliance efforts for five years, and granted members of the Department of Justice staff "visitorial and document examination rights so that they may further monitor Greyhound's compliance efforts," *id.* at 886. Because Greyhound appeared to be attempting to comply fully, no further injunctive relief was ordered.

While the proceeding to enforce the Commission's order was in progress, this antitrust case had come to trial and concluded with the verdict in Mt. Hood's favor. The opinion of the court in the enforcement proceeding noted that "many of Greyhound's actions that were found to be in violation of the order, were also found to be in violation of

the antitrust laws" in this private suit. *Id.* at 884 n. 2. The enforcement court denied Mt. Hood's prayer for damages for expenses related to the contempt action and for injury to its business as a result of the contempt, on the ground that the damages awarded in this antitrust proceeding "will adequately compensate [Mt. Hood] for any damages it may have also suffered as a result of Greyhound's contempt. This is particularly true since many of the same acts of Greyhound that were found to be contemptuous were also involved in the private antitrust case." *Id.* at 888. The court of appeals affirmed the criminal contempt convictions, stating, "the record of this case shows a flagrant disregard of a court order" that was intended "to insure that Greyhound would comply with representations it made at the acquisition hearings and cease its predatory practices toward Mt. Hood." *United States v. Greyhound Corp.*, 508 F.2d 529, 540-41 (7th Cir. 1974).

From this recital it is evident that the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same. The Commission's authority to regulate this conduct is not challenged.

Whether conduct Congress has made subject to administrative regulation is exempt from the antitrust laws depends upon Congress' intent. No direct evidence of a congressional intent relevant here has been cited.[5] The only applicable statutory language dealing with the question of antitrust immunity is that found in section 5(11), quoted above. The conduct charged in this action is not within the

5. The subject of antitrust immunity was touched upon briefly during the House debates. 58 Cong.Rec. 8593-94 (1919). The scope of the immunity was not discussed. Representative Sanders assured other House members that the antitrust laws were not being "wiped out"—that a merger will only be allowed if it would benefit the public. *Id.*

express exemption afforded by sections 5(11), particularly because provisions of this kind are strictly construed.[6] Since the Commission approved the acquisition in reliance upon Greyhound's commitment that the conduct underlying the anti-trust complaint would not occur if the acquisitions were approved, it can hardly be argued that antitrust immunity for such conduct is "necessary" to enable Greyhound "to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired through such transaction."

The inclusion of this express exemption in the statute implies a congressional intention that conduct not within the exemption remains subject to the antitrust laws.[7] But this conclusion does not always follow; despite a grant of express immunity that does not cover the conduct charged, antitrust immunity may still be implied.[8]

6. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316, 76 S.Ct. 937, 100 L.Ed. 1209 (1956).

7. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216-17, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); *United States v. Borden Co.*, 308 U.S. 188, 201, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

8. *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 918-19 & n. 24 (9th Cir. 1975). *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the decision relied upon most heavily by Greyhound, involved an express exclusion, and it is not entirely clear that the conduct that case held to be immunized from the antitrust laws was within the express exclusion, narrowly construed. The Court suggested as much when it noted, "a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances *by implication* grant immunity from an antitrust claim." *Id.* at 385 n. 14, 93 S.Ct. at 660 (emphasis added). The Supreme Court has twice cited *Hughes Tool* as a case in which immunity was implied. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed. 2d 463 (1975); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734-35, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975).

Because of the "fundamental national policies embodied in the antitrust laws," *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973), however, repeal of those laws is not lightly implied from congressional adoption of a regulatory scheme.[9] Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency,[10] as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy,[11] as it did in this instance.[12]

The applicable interpretative standard was restated by the Supreme Court in *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 597, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976): "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.' "[13] As the Court had written in the preceding

9. *United States v. National Ass'n of Sec. Dealers, Inc.,* 422 U.S. 694, 719-20, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

10. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 596-97 n. 36, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 692, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (Stewart, J., concurring); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 372, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

11. *Gulf States Util. Co. v. Federal Power Comm'n,* 411 U.S. 747, 758-60, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

12. *Port of Portland v. United States,* 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases,* 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States,* 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

13. *Quoting Silver v. New York Stock Exch.,* 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

term, "Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975).[14]

Applying these standards, we find no reason to imply immunity here. No "plain repugnancy" exists between the Interstate Commerce Act and the Sherman Act as applied to Greyhound's conduct, and it is not necessary to exempt Greyhound's conduct from antitrust restraints "to make the [Interstate Commerce Act] work." This is evident from the course taken in the administrative and judicial proceedings under both statutes. Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. There has been initial resort to the Commission for an application of its expertise to the factual issues relevant to whether application of the antitrust laws would be incompatible with regulatory objectives, *see Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, S.Ct. 573, 34 L.Ed.2d 525 (1973), and the Commission has unqualifiedly indicated that is has not approved and continues to disapprove Greyhound's conduct under regulatory standards applied in the light of antitrust principles. *See Mt. Hood Stages, Inc.,* 104 M.C.C. 449, 458, 460-63 (1968) (citing *Marnell v. United Parcel Service of America, Inc.,* 260 F.Supp. 391 (N.D. Cal.1966)).

14. *Quoting United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 518 F.2d 913, 918-19 (9th Cir. 1975).

The remedies afforded under the two statutes have also meshed. The injunction issued in enforcement of the regulatory determination was not duplicated in the antitrust proceeding. In assessing the penalty for contempt for violation of that injunction, the court was careful to avoid the possibility of double damages. *See United States v. Greyhound Corp., supra,* 370 F.Supp. at 888. The losses sustained by Mt. Hood during the contempt period (approximately February 5, 1970, to March 15, 1973, see *id.* at 884 n. 2) were only a small part of the total damages Mt. Hood sustained from the inception of Greyhound's wrongful conduct in 1947. The remaining damages could be and were recovered only in the antitrust action. Trebling the damages —an effective support for the competitive policy reflected in both statutes—could be and was accomplished only in the antitrust proceeding. Since the transactions involved offended the policies of both statutes and those policies were advanced and not impaired by the application of both statutes, it is reasonable to assume Congress would have intended both to apply.

Greyhound leans heavily upon *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973). From this decision Greyhound draws the general principle that when antitrust immunity is conferred by a statute upon participants in an acquisition approved by a regulatory agency, the immunity extends to conduct made possible by the acquisition whether or not the conduct itself was approved, at least where the agency considered the possibility such conduct might occur and retained continuing jurisdiction to regulate it in the public interest. But antitrust exemption is implied "*only* to the *minimum* extent necessary" to make the regulatory scheme work (emphasis added). Quoting this principle, and citing *Hughes*

Tool and *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Supreme Court recently wrote, "[W]e have implied immunity in *particular and discrete instances* to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *United States v. National Association of Securities Dealers, Inc.,* 422 U.S. 694, 734-35, 95 S.Ct. 2427, 2450, 45 L.Ed.2d 486 (1975) (emphasis added).

Greyhound's generalization may accommodate the facts of both *Hughes Tool* and the present case, but it omits the distinguishing particulars that made antitrust immunity appropriate in *Hughes Tool* and would make it inappropriate here. The crux of the distinction between the two cases is that, as the Supreme Court viewed the record in *Hughes Tool,* the regulatory agency involved had considered the type of conduct which underlay the antitrust complaint and had approved it as in the public interest;[15] a successful antitrust suit therefore necessarily would have been repugnant to operation of the regulatory scheme. The opposite is true in this case: the Interstate Commerce Commission did not contemplate Greyhound's challenged conduct as likely to occur and thus did not approve such conduct when it approved the acquisitions.[16] The Commission also subsequently disapproved that conduct.

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15. *See In re REA Express, Inc.,* 412 F.Supp. 1239, 1261 (E.D. Pa. 1976); *Air Freight Haulage Co. v. Ryd-Air, Inc.,* 408 F.Supp. 446 (S.D.N.Y. 1976).

16. *See Scroggins v. Air Cargo, Inc.,* 534 F.2d 1124, 1131 (5th Cir. 1976).

In *Hughes Tool* the Civil Aeronautics Board issued orders approving acquisition of control of TWA by Hughes Tool Co. The applicable statute relieved persons affected by such an order from operation of the antitrust laws so far as necessary "to do anything authorized, approved or required by such order." Section 414, Federal Aviation Act, 49 U.S.C. § 1384. The agency-authorized control later ended, and an antitrust suit was brought by TWA against Hughes Tool Co. based upon transactions between the two during the period of Hughes Tool Co.'s control. The antitrust complaint alleged, in effect, that the controlling company had exercised its control to dictate the completion of the transactions in a way that injured the controlled company.

Hughes Tool Co.'s control of TWA was acquired in two steps—an initial acquisition of 45.6 percent of TWA's stock, and a later acquisition increasing Hughes Tool Co.'s holdings to 80 percent. Both acquisitions were approved by the Board. In hearings related to the second acquisition the Board examined the manner in which Hughes Tool Co. had exercised its *de facto* control over TWA in the earlier period, particularly with respect to the acquisition of new flight equipment, which was the subject matter of the transactions on which the antitrust suit was based. The Board conceded allegations of abuse of the kind alleged in the antitrust complaint. Nonetheless, the Board concluded that continuation and enhancement of Hughes Tool Co.'s control was in the public interest. Moreover, the Board's order required that all substantial sales transactions between the two companies be submitted to the Board for approval, and, pursuant to this requirement, the transactions upon which the antitrust complaint rested were submitted to the Board and approved as in the public interest.

The Supreme Court noted that the subject matter of the Board's approval had been the acquisition and exercise by Hughes Tool Co. of control over the same kind of transactions as those at issue. *Hughes Tool, supra*, 409 U.S. at 386, 93 S.Ct. 647. By its approval the Board had determined that such control was in the public interest and consistent with the regulatory statute's prohibitions against monopoly and restraining competition. Sections 102(c) and 408(b), Federal Aviation Act, 49 U.S.C. §§ 1302(c) and 1378(b).[17] The Court further noted that the Board had also approved the very transactions underlying the antitrust suit as meeting the same standard. 409 U.S. at 379, 387, 93 S.Ct. 647.

An antitrust suit challenging these transactions, the Court said, would seek "to negate what the Board, after full investigation, had found consistent with § 408's anti-monopoly provision, consistent with § 102's competition standard, and consistent with the public interest." *Id.* at 388, 93 S.Ct. at 661. TWA's antitrust suit sought "to terminate a relationship the continuation of which the Board had found essential to both TWA and the public interest and to penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming." *Id.*[18]

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17. Acquisition of control of one company by another necessarily contemplates exercise by the parent of control over the internal business operations of the subsidiary. When the agency has approved acquisition of control, exclusive agency jurisdiction over its exercise is more readily implied. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385-86, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), *citing Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), as such a case.

18. *See also Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

The Court concluded that the transactions were exempt from suit under the Sherman Act.[19]

In sum, in *Hughes Tool*, the propriety under the regulatory statute of the activity challenged in the antitrust suit (control by Hughes Tool Co. of the manner in which its TWA subsidiary acquired new aircraft) was the central issue presented to the agency for consideration in the

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19. The Court summarized its holding in almost identical language at two points in the opinion:

At pages 387-88, 93 S.Ct. at page 661, the Court said:

> We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws. . . . But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

And again at page 389, 93 S.Ct. at page 661-662:

> We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American*, 371 U.S., at 305, [83 S.Ct. at 482]. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

exercise of its regulatory authority, and the agency had resolved the issue by approving such control as in the public interest. Exemption from the antitrust laws was implied because a successful application of the antitrust laws to the conduct would have negated the regulatory agency's determination and faced the regulated carrier with inconsistent governmental commands. In the present case, as has been seen, the premise of inconsistent regulatory and antitrust demands is absent. Also unlike *Hughes Tool,* the instant suit is not brought by a subsidiary against its parent and does not challenge the effect on the acquired company of the daily intercompany control that was integral to the acquisition. *See also Pan American World Airways v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). Rather, the instant suit is brought by a third party to the approved acquisitions, challenging conduct with regard to the third party that not only was not integral to the Commission's acquisition approvals but was violative of specific representations made by Greyhound at the acquisition hearings. In these circumstances, Greyhound's conduct is not immune from antitrust strictures.

II.

Jury Instructions and Admission of Evidence

Many of Greyhound's assertions of error in evidentiary rulings and instructions rest upon Greyhound's theory of antitrust immunity and fall with it.

Greyhound complains of the district court's "failure to instruct on Section 5(11)." It is not clear precisely what Greyhound has in mind. The extent to which Greyhound's conduct was exempt from the antitrust laws by the Interstate Commerce Act was a legal question, not an issue of

fact for the jury.[20] The instructions proposed by Greyhound were properly rejected for this reason and because they reflected Greyhound's uncompromising position that the acquisitions approved by the Commission and all conduct involving exercise of control over the acquired carriers were exempt from the antitrust laws and were not to be considered by the jury for any purpose whatever.[21]

The court was required to provide the jury with standards to apply in determining whether Greyhound was liable under the antitrust laws, and it did so. The court defined the elements of monopolization, attempt to monopolize and unreasonable restraint of trade in the usual way, and Greyhound does not object to these instructions in themselves. The court also told the jury that the fact that Greyhound was regulated affected what activities of Greyhound were subject to the antitrust laws; that in a regulated industry

20. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 688, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975).

21. For example, Greyhound requested an instruction that since the Commission had approved the acquisitions, "the manner in which defendants have used or exercised the control of these carriers" was within the exclusive jurisdiction of the Commission, and therefore the jury "must exclude from [its] consideration all conduct by defendants involving exercise of control over the acquired bus companies." Greyhound also requested instructions referring to the specific conduct the Commission had condemned, and telling the jury that regulation of such conduct was within the exclusive jurisdiction of the Commission and could not be the basis of any findings by the jury.

In addition, Greyhound requested an instruction essentially in the words of the statute, telling the jury that the antitrust laws did not apply to the approved acquisitions "or to anything done by defendants which was necessary to hold, maintain or operate the properties or operating rights obtained in these approved transactions." Since the scope of the immunity conferred by the statute was a legal question for the court to decide, this instruction was properly refused. *See* note 20, *supra*, and related text. The court's decision as to the scope of the statutory immunity shaped and conditioned the court's instructions spelling out what facts the jury must find before Greyhound could be held liable.

the existence of monopoly power was not evidence of monopolization, but "use of monopoly power even if lawfully acquired, to foreclose or restrain competition, to gain a competitive advantage or to eliminate a competitor" was such evidence.[22] Under these instructions the jury could not base a finding of monopolization on the approved acquisitions themselves; improper use of the acquired power was required. This was at least as favorable to Greyhound as the law warranted.

Greyhound objects to the admission of evidence regarding the administrative and related court proceedings, and to jury instructions that this evidence could be considered "in determining the issue of Greyhound's motive, intent and purpose and reasonableness of its behavior." Greyhound objects on several grounds, but primarily on the basis of Greyhound's immunity argument, which we have rejected. Greyhound's other objections are also without merit.[23] The

22. The quoted portion of the instruction is settled law. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). Indeed, section 2 is violated if exclusionary tactics are used to maintain a lawfully acquired monopoly. *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344-45 (9th Cir. 1970), *interpreting United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 343 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). *See also TV Signal Co. v. American Tel. & Tel. Co.*, 462 F.2d 1256, 1261 (8th Cir. 1972).

23. One of these additional grounds of objection warrants brief comment. Greyhound argues that the instructions permitting use of evidence of the administrative proceedings in determining Greyhound's intent and the reasonableness of its conduct "infringe" Greyhound's constitutional privilege to seek relief before administrative agencies, *citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). But "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514, 92 S.Ct. 609, 613, 30 L.Ed.2d 642 (1972). The antitrust laws have

evidence was properly used for the purpose stated by the court.

The lengthy instructions contained two brief passages apparently inspired by *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965), and *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Greyhound argues that these passages permitted imposition of liability if the jury found no more than that Greyhound had perpetrated a fraud on the Commission or had acted in bad faith in the administrative and related judicial processes, rendering those processes ineffective. Even considered alone, however, both passages also required the jury to find, as a condition of liability, that the fraud or abuse of process resulted in an administrative order that conferred a monopoly or an unreasonable competitive advantage upon Greyhound. At most, therefore, the only question raised by these passages is whether the doctrine of *Walker Process* applies outside the patent field.

When the passages are read in light of the parties' contentions, the evidence in the case, and the instructions as a whole, however, we do not believe they present even this issue. Mt. Hood did not contend that the acquisitions themselves or the power Greyhound gained through them, standing alone, constituted a violation of the antitrust laws. Mt. Hood relied instead upon Greyhound's exclusionary practices made possible by the acquisitions. The instructions were generally to the same effect. The jury was not instructed on any theory that Greyhound's purchase of other carriers might constitute the unlawful acquisition of monopoly power. On the contrary, as we have seen, the jury was told that in such a regulated industry the mere possession of monopoly power did not violate the Sherman Act, and that abuse of monopoly power to eliminate competition was required. The only fraud or abuse of process presented by the evidence was that Greyhound represented to the Commission that it was not using and would not use any of the acquired routes to engage in the predatory practices we have outlined earlier, and that Greyhound nonetheless did so. Since these same predatory practices underlay Mt. Hood's antitrust claim, since the instructions also conditioned liability upon a finding of monopolization or unreasonable restraint of competition defined in the usual way, and since the judge properly ruled without submitting the issue to the jury that Greyhound's challenged conduct was not immunized from antitrust attack, the passages amounted to no more than a reiteration in another form of the general instruction that unreasonable restraint of competition or use by Greyhound of monopoly power to foreclose or restrain competition would violate the antitrust laws.[24]

Greyhound attacks the use made at trial of two antitrust consent decrees entered into by Greyhound and the United States. The decrees, which were admitted in evidence, prohibited Greyhound from refusing to establish through-routes with competitors and from continuing other prac-

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been applied in many factual contexts that included utilization of administrative processes by the antitrust violator. *See, e.g., Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.,* 489 F.2d 203 (9th Cir. 1973).

24. Thus even if appellant was entitled to an instruction that "fraud" must be proven by "clear and convincing" evidence, as Greyhound urges, failure to give it was harmless under Fed.R.Civ. P. 61.

tices the same as or similar to those charged in this suit. The jury was told it could consider the decrees and Greyhound's conduct with respect to obeying or disobeying them in determining the issue of Greyhound's intent and purpose and the reasonableness of Greyhound's behavior.

A trial judge must be accorded "wide latitude" in determining the relevance of evidence in antitrust cases. *Grey v. Shell Oil Co.*, 469 F.2d 742, 751 (9th Cir. 1972). The admissibility of a consent decree is a matter committed to the court's discretion. See *Control Data Corp. v. IBM Corp.*, 421 F.2d 323, 326 (8th Cir. 1970). *See also Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1938). There was no abuse of discretion here. The court warned the jury of the limitations implicit in decrees entered into by consent, and confined their use to a proper purpose.

Greyhound's claim that the jury should not have been asked to determine whether Greyhound had a dominant share of the market because Greyhound's market share resulted from ICC-approved transactions is but another reflection of Greyhound's rejected theory of immunity.

Other objections to the instructions regarding the relevant market are without merit. While it is true that the court did not refer to the "interchangeability of services" in those terms, the court accomplished the same purpose by use of illustrations and by instructing the jury that a "relevant" market must be one for a "distinct service" with "peculiar characteristics," serving "distinctive purposes," with "dissimilar" price characteristics, and relatively "insensitive to price variations," so that an increase in bus fares would not result in large numbers of customers switching to other forms of intercity transportation. If these indices of distinctness were not found, the jury was told,

intercity bus transportation would not constitute a relevant market for antitrust purposes.[25]

III.
Statute of Limitations

The jury awarded Mt. Hood damages for injuries sustained from 1953 to 1973. The applicable statute of limitations, 15 U.S.C. § 15b, bars all claims on which suit is not commenced within four years after they accrue—in this case, all claims that accrued before July 5, 1964, since Mt. Hood's suit was filed on July 5, 1968. However, Mt. Hood asserts that the running of the limitations period was suspended from 1953 to 1960 by Greyhound's fraudulent concealment of its wrongdoing, and from 1964 to the date of suit by the intervention and participation of the United States in the section 5(9) proceedings brought by Mt. Hood before the Commission.[26]

In accordance with the universal rule, our circuit holds that fraudulent concealment of the existence of an antitrust cause of action tolls the four-year statute of limitations

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25. Greyhound contends the jury was instructed as to several contentions for which there was no evidentiary support. We have examined the record with respect to each of these issues and conclude that either there was sufficient evidence to justify an instruction or the instruction was harmless under Fed.R.Civ.P. 61.

26. *See* note 4, *supra*, and related text. The period of fraudulent concealment and the government intervention tolling period can be "tacked" or "bridged" to suspend the statute for the entire period since the time between the two did not exceed four years, albeit short by only a day. *See, e.g. City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-61 (2d Cir. 1974); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567-72 (10th Cir. 1962); *Maricopa County v. American Pipe & Constr. Co.*, 303 F.Supp. 77, 84-86 (D.Ariz.1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970).

provided by section 15b.[27] The jury found Greyhound had fraudulently concealed its antitrust violations from 1953 to December 14, 1960, and that Mt. Hood neither knew nor should have known of these violations prior to December 14, 1960.

Greyhound does not deny the sufficiency of the evidence to show it attempted to conceal its conduct. It argues, however, that Mt. Hood had notice of Greyhound's activities long before December 14, 1960.

The record shows that Mt. Hood complained about quoting and routing practices of Greyhound agents on various occasions during the 1953-1960 period. The record also shows, however, that Greyhound continuously represented to Mt. Hood and to the Commission that these were isolated incidents not countenanced by Greyhound's management.[28]

The record shows that Mt. Hood suspected Greyhound of unlawful conduct prior to December 14, 1960, but "[s]uspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred." *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973).

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27. *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); accord. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Crummer Co. v. Du Pont*, 255 F.2d 425 (5th Cir. 1958).

28. Greyhound argues that such representations, denials, and other attempts at concealment are immaterial citing such cases as *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 752 (9th Cir. 1936); *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670, 673 (9th Cir. 1936). But as these cases demonstrate, attempts at concealment lose their relevance only when they occur after plaintiff already knew or should have known of the unlawful conduct. In the present case the jury weighed the evidence and concluded that, in part because of Greyhound's attempts at concealment, Mt. Hood neither knew or should have known of Greyhound's antitrust violation.

There was evidence that Mt. Hood's president expressed concern over Greyhound's expansion by acquiring other carriers, and that he also stated his belief that the consent decrees were being violated. Awareness of Greyhound's growing dominance of the market was not equivalent to notice of monopolization, however, for the acquisitions were approved by the Commission and presumably immunized from the antitrust laws. Nor was knowledge of violations of the consent decrees equivalent to such notice, for, as Greyhound itself is careful to point out, violations of consent decrees are not in themselves violations of the antitrust laws.

Greyhound asserts that Mt. Hood was charged with the duty to investigate once it became aware of facts from which antitrust violations should reasonably have been inferred.[29] But in the face of Greyhound's assurances and denials of responsibility, we cannot say as a matter of law that Mt. Hood's awareness of the growth of Greyhound's power through acquisitions and of the commission of predatory acts by some of Greyhound's agents amounted to notice of potential antitrust claims against Greyhound.

We conclude, therefore, that the trial court properly refused to set aside the jury's determination that Greyhound fraudulently concealed its antitrust violation, and that Mt. Hood had neither actual nor constructive knowledge of the violation until December 14, 1960.

Four years later, on December 14, 1964, one day before Mt. Hood's antitrust claim would have been barred, the United States intervened in the section 5(9) proceedings Mt. Hood had instituted before the Commission in October, 1964. The trial court held that, under the provisions of

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29. *See* note 28, *supra*, and cases cited therein.

15 U.S.C. § 16(i), the intervention and the subsequent participation by the United States in the Commission proceedings tolled the running of the statute of limitations until those proceedings terminated in 1974, well after the filing of the present suit.

Section 16(i) provides that running of the limitations period on a private cause of action is suspended during the pendency of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws."[30] Greyhound argues that section 16(i) is inapplicable because the administrative proceedings were not "instituted by the United States" and because they were not proceedings "to prevent, restrain, or punish violations of any of the antitrust laws."

The literal wording of section 16(i) is not controlling. Where one possible interpretation of the language would effect the congressional purpose and another defeat it, the former is to be adopted. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). The clearly expressed purpose of section 16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts. *Id.* at 320, 85 S.Ct. 1473. This purpose would be served by interpreting section 16(i) to encompass the government's intervention and participation in the section 5(9) proceedings before the Commission—a reading the language readily permits.

The proceedings were of a kind likely to produce benefits to Mt. Hood as a plaintiff in a subsequent antitrust suit.[31] The issues, as we have seen, were largely the same. Governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues. The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity.

It would make form controlling to hold section 16(i) inapplicable merely because Mt. Hood rather than the United States instituted the proceedings. The United States intervened little more than 60 days after the filing of Mt. Hood's petition and participated actively in all subsequent stages of proceedings that required nearly a decade to complete. Nothing would be gained, and a good deal of judicial and administrative time and efficiency would be lost, if the United States were compelled to institute a separate independent proceeding in district court under 15 U.S.C. § 26

30. 15 U.S.C. § 16(i) reads in part:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

31. The question is not whether the government proceedings actually conferred benefits upon the private antitrust plaintiff, but whether the character of the proceedings was such that they were likely to do so. Thus in analyzing the issue the Supreme Court spoke of government action which "may aid the private litigant." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). If actual benefit were the test, it might be impossible to determine whether the government proceedings would toll the running of limitations until those proceedings were finally concluded. Private plaintiffs would be compelled to file their antitrust suits although government proceedings involving the same subject matter were still in progress.

to assure private treble damage litigants the benefits Congress intended they should have from the government's action. As the trial court concluded, "the Congressional intent behind [16(i)] is better served by treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them."

In addition to relying on the language of the statute, Greyhound argues that section 16(i) applies only when the United States initiates rather than intervenes in a proceeding because of the Supreme Court's statement in *Minnesota Mining* that the purpose of section 16(i) is to permit private parties the benefit of *"prior government actions."* 381 U.S. at 320, 85 S.Ct. 1473 (emphasis by Greyhound). Obviously, the Court was referring only to actions occurring before the antitrust suit was commenced. Greyhound's argument epitomizes the kind of "grudging interpretation" which "would collide head-on with Congress' basic policy objectives." *Id.*

When the substance of the government's intervention and participation before the Commission is examined, it falls fairly within the class of proceedings "to prevent, restrain, or punish violations of any of the antitrust laws" to which section 16(i) applies. It is not controlling that the government's action was taken in an administrative rather than judicial setting, *Minnesota Mining, supra,* 381 U.S. at 320, 85 S.Ct. 1473, nor that the proceedings were not brought under the antitrust laws, *Luria Steel & Trading Corp. v. Ogden Corp.,* 484 F.2d 1016, 1020-21 (3d Cir. 1973); *Rader v. Balfour,* 440 F.2d 469, 473 (7th Cir. 1971). The government action suspends the running of the limitation period under section 16(i) if it "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws," *Rader v. Balfour, supra,*

440 F.2d at 473, for it is government participation in such a proceeding that is likely to produce the benefits that Congress intended plaintiffs in later private treble damage actions to have.

The government's petition to intervene demonstrates that its interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct. To explain its interest in the proceedings and its desire to participate as a party, the government stated:

> The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound's routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8-9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business. . . .

The petition noted Mt. Hood's increasing vulnerability to and dependence on Greyhound. It referred to Greyhound's "predatory conduct" and to the possibility of Mt. Hood's "extinction at the hands of an infinitely more powerful rival." The petition concluded:

> Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exer-

> cise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not.

As Greyhound itself admitted before the district court in its motion to dismiss the complaint, a purpose of the Justice Department's intervention was "to assure the adequate consideration of antitrust issues."

Antitrust issues were an appropriate part of the proceedings. The Commission was required to consider the anticompetitive effects of the section 5(2) transactions in framing, and modifying, its order.[32] Early in the proceedings Greyhound was reminded "that the antitrust laws and the national transportation policy . . . offer certain broad guidelines to be kept in mind in determining this proceeding." *Mt. Hood Stages, Inc., supra,* 104 M.C.C. at 451. The Commission rested its decision upon the conclusion that Greyhound's conduct "constitutes destructive competition in contravention of the national transportation policy." *Id.* at 463.[33] In sustaining the Commission's order the district court wrote:

> It is inconceivable to us that Congress intended that destructive practices made possible by acquisition approvals may not be corrected by supplemental order under Section 5(9), especially in light of the ICC's

32. *Port of Portland v. United States,* 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases,* 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States,* 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

33. The Commission rejected Greyhound's argument that Greyhound's practices were not in themselves unlawful on the basis of the antitrust principle that "actions which are not in themselves unlawful may be unlawful when they are part of a plan to monopolize or restrain commerce." *Mt. Hood Stages, Inc.,* 104 M.C.C. 449, 458 (1968). The Commission cited the Sherman Act case of *Marnell v. United Parcel Service of America, Inc.,* 260 F.Supp. 391 (N.D.Cal.1966).

> duty to take the antitrust policy of the United States into account in its decision making.

Greyhound Lines, Inc. v. United States, supra, 308 F.Supp. at 1038.

Because Congress' purpose in enacting section 16(i) will be served by this interpretation, and because the language of the section does not bar it, we conclude that the government's intervention in the section 5(9) proceedings on December 14, 1964, tolled the running of the limitations period from that date.[34] Accordingly, Mt. Hood's antitrust complaint was timely filed.

IV.

Damages and Attorneys' Fees

Greyhound contends that Mt. Hood failed to offer adequate proof either that Mt. Hood was injured by Greyhound's conduct or of the amount of the damage. With respect to the fact of damage, Greyhound's claim is frivolous. The jury may infer the fact of damage if "plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss." *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 697, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). Mt. Hood offered evidence that its bridge traffic declined sharply during the relevant period.[35] Greyhound's

34. We need not reach Mt. Hood's contention that the statute was tolled to December 14, 1960, by virtue of Mt. Hood's commencement of the section 5(9) proceedings.

35. Mt. Hood offered evidence, for example, that Mt. Hood's bridge traffic consisted of 25,258 passenger trips, or approximately 44 percent of the total relevant bridge traffic, in 1963 and had fallen to 930 passenger trips, or approximately three percent of the total, by 1969.

conduct found to violate the antitrust laws was directed at creating precisely this kind of loss.[36] There was no indication of an alternative source of loss sufficient to negate an inference that Greyhound's violation was a material cause. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Mt. Hood's proof of the amount of damage was less certain and necessarily so. What Mt. Hood's business volume and profits would have been except for Greyhound's antitrust violation is inescapably uncertain. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir. 1957). In such a case, the amount of damages may be shown "as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 249, 75 L.Ed. 544 (1931).

The premise of Mt. Hood's calculation of lost profits was that 95 percent of bus passengers would have traveled Mt. Hood's shorter bridge routes if they had had that choice. Greyhound asserts that Mt. Hood's premise "defies the record as well as common sense and is untenable," and therefore the entire calculation of damage fails. There was ample evidence from which the jury could reasonably infer that the shortest bus route is generally fastest, including studies comparing Greyhound's and Mt. Hood's schedules

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36. As described previously, Mt. Hood alleged and offered substantial evidence to prove that Greyhound had cancelled the north-south through-bus connection arrangement on which Mt. Hood depended for a substantial portion of its traffic, scheduled its services so as to preclude reasonable connections with Mt. Hood, directed independent and joint ticket agents to long-haul traffic around Mt. Hood, and interfered with distribution of Mt. Hood schedules.

from 1950 to 1970 with regard to mileage and time.[37] Mt. Hood also introduced evidence from which the jury could reasonably infer that as a general rule 95 percent of bus passengers would take the fastest route when given a choice.[38] It is of course true that the evidence did not demonstrate to a certainty that 95 percent of passengers would have traveled Mt. Hood's shorter routes absent the restraints imposed by Greyhound's violation, but in the nature of the case proof to a certainty is not possible and is not required.

Greyhound challenges virtually every other facet of Mt. Hood's proof of damage. We have examined each of Greyhound's objections in light of Mt. Hood's response and the evidence in the record. No useful purpose would be served by a tedious recapitulation of these materials. We are satisfied that the evidence offered by Mt. Hood permitted the jury to make a reasonable and just inference of the amount of Mt. Hood's damage.[39]

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37. These studies were part of a larger damage study commissioned by Mt. Hood. The study was supplemented by the testimony of three expert witnesses over a two-week period. The study was based on statistical computations verified by Arthur D. Little & Co., an independent management consulting firm. Mr. Jizmagian, Arthur D. Little & Co.'s representative who supervised the study, testified that maximum use was made of all available data supplied by Greyhound and where such data was not available every assumption and method "and every use of statistics and every use of ratios was done . . . with standard statistical techniques and there was, in my opinion, no speculative use of numbers." He concluded that the study accurately reflected Mt. Hood's damages.

38. For example, Mt. Hood's damage study, *see* note 37, *supra*, included a comparison of passenger utilization of three available "'All Greyhound' routes from Oregon and Washington points to Los Angeles," showing that more than 95 percent of the bus passengers chose the shortest of the three available routes.

39. This holding also encompasses the damage awards for express traffic Mt. Hood lost between 1964 and 1971, and for local traffic it lost between 1964 and 1970.

We also sustain the award of attorneys' fees. Greyhound objects that the amount of the award divided by the number of hours devoted to the litigation by plaintiff's attorneys yields an exorbitant hourly rate. But as the experienced trial judge stated, "compensation at an hourly rate would be inadequate in a case of this kind," which "is, in many ways, unusual . . . its complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists." The trial court based the award upon knowledge gained in four years' involvement in all aspects of the case, the evidence presented by the parties on this issue, and the factors prescribed in *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964). The award represented an appropriate exercise of the district court's discretion.

Affirmed.

United States Court of Appeals

for the Ninth Circuit

No. 74-1282

Mt. Hood Stages, Inc., dba Pacific Trailways,
Plaintiff-Appellee,

v.

The Greyhound Corporation and
Greyhound Lines, Inc.,
Defendants-Appellants.

[August 3, 1977]

ORDER

Before: BROWNING and WRIGHT, Circuit Judges, and
*LINDBERG, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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*Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

Supreme Court of the United States

No. 77-598

The Greyhound Corporation, et al.,
Petitioners,

v.

Mt. Hood Stages, Inc., etc.

ORDER ALLOWING CERTIORARI. Filed January 9, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, limited to Question 3 presented by the petition.